90-1848

(1)

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

PHILIP R. OLENICK
[Counsel of Record]
PAUL L. NEVINS
40 Court Street-Suite 926
Boston, MA 02108
(617) 720-4100
Attorneys for Petitioner

May 28, 1991

Questions Presented.

I. May a federal Court of Appeals undermine the federal doctrines of *res judicata* and estoppel by judgment by explicitly disregarding, as incorrect *dicta*, a prior federal court's express words of disposition?

II. May a federal Court of Appeals undermine federal rules of waiver and estoppel by allowing a party to collaterally attack, as incorrect *dicta*, a prior federal court's express words of disposition in a proceeding to which it was a party, where it had neither brought the asserted error to the attention of the first court nor appealed from the disposition it now wishes to avoid?

III. May a federal Court of Appeals rewrite the federal rules of compulsory joinder of claims, retroactively, by treating the omission of an alternative basis for jurisdiction over a claim in a prior action, which resulted in a dismissal without prejudice, as the preclusive *omission* of that claim?

List of All Parties.

Petitioner

1. Carl Kale

Respondent

2. Combined Insurance Company of America

Table of Contents.

Questions Presented 1
List of All Parties ii
Table of Contents iii
Table of Authorities v
Citations to Opinions Below 1
Jurisdiction 2
Statement of the Case 2

Reasons for Granting the Writ 7

I. A Federal Court's Express Use of the Words "Without Prejudice" in Dismissing a Claim Is Binding, And May Not Be Ignored in Order to Treat That Dismissal As Precluding Further Suit 7

II. The Respondent's Failure to Either Advise District Judge Skinner of the Existence of Diversity Jurisdiction to Secure a Final Adjudication or to Appeal His Use of the Words "Without Prejudice" Should Bar It From Questioning That Disposition 14

III. A Claim That Was Joined Under Pendent Jurisdiction Is Not Transformed Into An "Omitted Claim" Simply Because A Second Basis For Jurisdiction Existed 17

Conclusion 22

Appendix

Decision of the First Circuit, January 25, 1991 ..... A-1
Memorandum by District Judge Tauro May 1, 1990 ..... A-18
Order of District Judge Tauro allowing motion of defendant to dismiss or for summary judgment, May 1, 1990 ..... A-32
District Judge Skinner's Memorandum and Order on Defendant's Motion for Summary Judgment, September 26, 1986 ..... A-33
Decision of the First Circuit denying rehearing, February 26, 1991 ... A-37
Order of the First Circuit denying rehearing *en banc*, February 26, 1991 ..... A-39
Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court, showing District Judge Tauro's denial of motion on face page A-40
Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment A-47

Table of Authorities.

CASES.

Allen v. McCurry, 449 U.S. 90 (1980) 11

Balcom v. Lynn Ladder and Scaffolding Co., Inc., 806 F.2d 1127 (1st Cir. 1986) 15

Bath Iron Works Corporation v. Coulombe, 888 F.2d 179 (1st Cir. 1989) 15

Brown v. Board of Education, 347 U.S. 483 (1954) 4

Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Risty, et al., 276 U.S. 567 (1928) 10

Cromwell v. County of Sac, 94 U.S. 351 (1877) . 11

Crop-Maker Soil Services, Inc. v. Fairmount State Bank, 881 F.2d 436 (7th Cir. 1989) 20

Davis-Gilbert v. Alberto-Culver Co., No. 90-2727, 1991 U.S. App. LEXIS 6199, (7th. Cir., April 5, 1991) 20

Deposit Bank v. Frankfort, 191 U.S. 499 (1903) 11

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) 15

Fayerweather v. Ritch, 195 U.S. 276 (1904) ... 11

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 11, 18

Gray v. Lacke, et al.,885 F.2d 399 (7th Cir. 1989) 20

In re Public Service Co. of New Hampshire, 898 F.2d 1 (1st Cir. 1990) 15

Kempe's Lessee v. Kennedy, 5 Cranch (9 U.S.) 173 (1809) 11

Kotwitz v. Frank, 902 F.2d 37 (7th Cir. 1990) .. 20

La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900 (7th Cir. 1990) 20

Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc., 921 F.2d 732 (7th Cir. 1991) 20

Mursch v. Van Dorn Company, 851 F.2d 990 (1988) 20

Nevada v. U.S., 463 U.S. 110 (1983) 11

Plessy v. Ferguson, 163 U.S. 537 (1896) 4

Reed v. Allen, 286 U.S. 191 (1932) 11

Rosado v. Wyman, 397 U.S. 397 (1970) 9

Secon Service System, Inc. v. St. Joseph Bank and Trust Company, et al., 855 F.2d 406 (7th Cir. 1988) 20

Shaver v. F.W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988) 4, 5, 12, 18-21

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 3, 9, 19

RESTATEMENT (SECOND) OF JUDGMENTS.

§ 20(1)(b) 10
§ 24 10
§ 26(1)(a) 16, 17
§ 26(1)(b) 10, 16

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals for the First Circuit entered in this proceeding on January 25, 1991 and February 26, 1991 (denying rehearing).

Citations to Opinions Below.

The opinions of the Court of Appeals in this proceeding, both original and denial of rehearing, re-

ported as *Carl Kale v. Combined Insurance Company of America*, are reported at 924 F.2d 1161 and 1169 (1st Cir. 1991), and appear in the Appendix hereto along with the separate judgment and orders of that court.

The opinion of District Judge Tauro of the United States District Court for the District of Massachusetts in this proceeding is reported at 736 F.Supp. 1183 (D.Mass. 1990) and appears in the Appendix hereto, along with the unreported prior decision of District Judge Skinner in the initial action, rendered September 26, 1986, along with District Judge Taruo's unreported order denying the petitioner's motion for reconsideration of his decision.

Jurisdiction.

The judgment and opinion of the Court of Appeals for the First Circuit were entered on January 25, 1991. A timely petition for rehearing was denied on February 26, 1988, and the opinion and order on that denial are, as indicated above, included in the Appendix hereto. This Petition for Certiorari is being filed on the first business day 90 days after the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statement of the Case.

The petitioner was employed by the respondent in Massachusetts at Hearthstone Plaza until May 11, 1983. He had worked there since January 29, 1963, first as an employee of the respondent's wholly-

owned and directly-managed subsidiary and then as a direct employee of the respondent after the subsidiary was merged into the parent. He was fired with no prior notice, effective the same day.

The petitioner initially brought suit in the U.S. District Court for Massachusetts on both federal Age Discrimination and state law claims under Massachusetts law on May 8, 1985. Jurisdiction over the state law claims was asserted on the basis of pendent jurisdiction. The federal age discrimination claim was dismissed by District Judge Skinner in 1986 on the basis that the petitioner's administrative agency complaint had been untimely. District Judge Skinner then declined to exercise his discretion to retain the state law contract claim under pendent jurisdiction, and, citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), dismissed the state law contract claim "without prejudice."[1]

---

[1]*Memorandum and Order on Defendant's Motion for Summary Judgment*, A-33, at A-35 to A-36.

As noted in the opinion of the First Circuit here sought to be reviewed, A-1, at A-3, the petitioner appealed the dismissal of his federal ADEA claim in that action. That appeal sought to have the availability of equitable tolling extended to ADEA actions, which elicited an opinion recognizing such a possibility but denying it in that case. (Dismissal under *Gibbs* was not appealed, as it was a proper exercise of discretion.)

As noted in footnote 2 at A-3, the respondent sought sanctions for the petitioner's even having filed the action, and for taking that appeal. Sanctions were denied after

(continued...)

The current action was brought in Massachusetts' Middlesex Superior Court by the petitioner on May 10, 1989, asserting violation of express and implied promises to him, both written and oral, that he would not be discharged except for just cause. It was removed to the United States District Court for Massachusetts by the respondent, asserting diversity of citizenship, the amount in controversy exceeding the jurisdictional amount. Without answering, the respondent immediately moved to dismiss, or, in the alternative, for summary judgment, on the basis that District Judge Skinner's dismissal was *res judicata*.

The respondent's claim of *res judicata* was based on the argument that the petitioner's state law contract claim, although joined in the original action on the basis of pendent jurisdiction, could also have been supported by diversity jurisdiction, and that the petitioner's failure to plead diversity jurisdiction constituted "claim splitting," on the authority of *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988).

The petitioner pointed out to District Judge Tauro that the state contract claim had expressly been dismissed "without prejudice" by District Judge

---

[1](...continued)
the petitioner pointed out that on the respondent's theory, all those taking test cases should be sanctioned, including Thurgood Marshall, who challenged *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Skinner, explicit language absent from the dismissal leading to *Shaver* (a copy of which the respondent had submitted to District Judge Tauro). The petitioner argued that District Judge Skinner's use of the words "without prejudice" was binding on the respondent, as it had neither sought a conclusive adjudication of the state law claim under diversity jurisdiction nor appealed his use of the words "without prejudice."[2] The petitioner also argued that it would be incorrect and unfair to retroactively expand the rules of bar to use a 1988 case to transform a 1986 dismissal without prejudice into a preclusive dismissal with prejudice.

District Judge Tauro rejected the petitioner's reliance on the express "without prejudice" disposition of the state claim by asserting that they were unnecessary "magic words," as dismissals for lack of jurisdiction are always without prejudice.[3]

In his appeal brief to the First Circuit, the petitioner repeated the arguments he had made to District Judge Tauro.

At oral argument before a panel of the First Circuit, Chief Judge Breyer elicited from counsel for the respondent at oral argument before the panel the admission that the respondent knew of the existence

---

[2]See *Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment*, A-47, at A-51, and his *Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court*, A-40, at A-45.

[3]See *Memorandum* by District Judge Tauro, A-18 at A-30.

of diversity jurisdiction but chose not to tell District Judge Skinner in the prior action as it did not consider it to be its responsibility to do so, and suggested to respondent's counsel that the respondent should be estopped from such asserting this defense by its prior silence on the subject, including its failure to directly appeal the dismissal's being "without prejudice." Petitioner's counsel then offered to provide the First Circuit with copies of his memoranda before District Judge Tauro on this issue, which was declined as unnecessary.

The panel opinion, authored by Circuit Judge Selya, took no account of the admissions elicited at oral argument by Chief Judge Breyer, called the express words of disposition "supererogatory," and disregarded them as being based upon an incorrect and incomplete presentation of the facts.[4]

Having deprived District Judge Skinner's disposition of its normal preclusive effect against challenges to the correctness of the dismissal's being without prejudice, both District Judge Tauro and Circuit Judge Selya adopted the 1988 opinion of the Seventh Circuit which announced the expansion of the concept of "claim splitting" now relied upon by the respondents. They dismissed any protest that applying it retroactively to a 1986 dismissal in this case was unfair surprise, by saying that no exceptions would be made for those who had not followed the rules, even though those rules had never been

---

[4]Decision of the First Circuit, January 25, 1991, A-1, at A-13 to A-14.

announced by any court at the time of the prior action,[5] and despite Circuit Judge Selya's opening sentence trumpeting that this appeal presents an issue of "first impression in this circuit."[6]

On rehearing, the First Circuit denied that the use of the words "without prejudice" could bind the respondent, arguing that a prevailing party can never appeal, and asserted that the petitioner had waived any argument that the respondent had waived (or was estopped from advancing) the defense that the original dismissal was preclusive by never having presenting it before the petition for rehearing.

Reasons for Granting the Writ.

I. A Federal Court's Express Use of the Words "Without Prejudice" in Dismissing a Claim Is Binding, And May Not Be Ignored in Order to Treat That Dismissal As Precluding Further Suit.

The doctrines of *res judicata* and collateral estoppel, as laid down by decisions of this Court, hold that a court's explicit disposition of a claim, entered with jurisdiction after full opportunity to be heard and never appealed, may not be denied binding effect. Waiver and estoppel prevent a party to the initial action from even arguing that the first court acted in ignorance of facts which that party could

---

[5] *Id.* at A-12, n. 5.

[6] *Id.* at A-2.

have presented in that action, but which it chose not to present until now.

District Judge Skinner's prior dismissal of the Carl Kale's state law contract claim was expressly "without prejudice."

This disposition was made with jurisdiction to make it, after Combined Insurance (which has now admitted to Chief Judge Breyer that it knew perfectly well at the time that diversity jurisdiction existed, but had chosen not to tell Judge Skinner so) had been fully heard, and it was not appealed by Combined.

Under traditional, *and binding*, principles of *res judicata* and collateral estoppel, that disposition is insulated from review as to its correctness by decisions of this Court, as is argued below.

Justice Skinner consciously chose to use the words "without prejudice" knowing that they are (as District Judge Tauro derisively chose to call them) "magic words"[7] — as are all words of art that have been established as standard dispositions. They have a specific intended effect which may not be disregarded.

To do so, District Judge Tauro argued that they had no effect as they were part of a dismissal on the basis of lack of jurisdiction. This stands all expectations regarding finality on their head, holding that a final judgment can be found because there was no jurisdiction to say that the judgment was not final.

---

[7]At A-30.

It also ignores that there *was* jurisdiction, and that District Judge Skinner had simply chosen not to exercise it. As the Supreme Court said, in *UMW v. Gibbs*,

> Certainly, if the federal claims are dismissed without trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.[8]

If state claims "should" be dismissed, that means that this is the exercise of discretion, and that jurisdiction to retain them does exist.

Gibbs sets out guidelines for the exercise of discretion by the federal courts in exercising their jurisdiction, but it has been widely recognized as allowing federal courts to retain jurisdiction over pendent claims even after the federal claims that brought them to federal court are gone.[9]

Thus, the dismissal "without prejudice" was entered with full jurisdiction to do so, and itself should

---

[8]383 U.S. at 726-727.

[9]*See Rosado v. Wyman*, 397 U.S. 397, 403-403 (1970), which approved a district court's retaining jurisdiction of a pendent claim after dismissal of the federal claim. *See also* cases collected at fn. 20 to Jurisdiction § 3567.1, Volume 13B, *Federal Practice and Procedure*, Wright, Miller, Cooper (1984).

be accorded *res judicata* effect, barring the respondent's motion here.

Once District Judge Skinner's disposition is recognized as binding, reversal of District Judge Tauro's dismissal was required. Once the claim's dismissal's being "without prejudice" was established, it is outside *res judicata's* bar of claim splitting.

Both District Judge Tauro and Circuit Judge Selya quoted the *Restatement of Judgments (Second)*, specifically § 24, for the general rule of claim preclusion. The petitioner merely points to § 26(1)(b) of the *Restatement (Second)* which recognizes a clear exception to claim preclusion where:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

Dismissal "without prejudice" is, of course, the classic way to reserve a plaintiff's right to maintain an action again.[10]

(This is made equally clear by § 20(1)(b), to the same effect, which excludes from the rule of bar cases dismissed "without prejudice.")

District Judge Tauro and Circuit Judge Selya essay to avoid this result by denying District Judge Skinner's order that the state claim be dismissed "without prejudice" *res judicata* effect on the basis

---

[10]*Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Risty, et al.*, 276 U.S. 567 (1928) (dismissal "without prejudice" prevents assertion of *res judicata*).

that District Judge Skinner had incomplete information. This cannot be sustained.

This Court's decisions make it clear that between the original parties — which this petitioner and respondent are — a decision is binding, and cannot be upset on the basis that it was wrong or based on incomplete information.[11]

The only limitations are that such binding effect may be denied if the original decision was void as entered without jurisdiction, or was entered in violation of a party's due process right to be heard, or if the original decision has since been reversed upon appeal.

None of these limitations apply here.

If the federal court had jurisdiction to retain the case if it found it appropriate, then a decision to dismiss in such circumstances could be made either

---

[11]*Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (incorrectness of prior decision does not rob it of *res judicata* effect); *Deposit Bank v. Frankfort*, 191 U.S. 499, 510, 514 (1903) (reasons for decision not open to inquiry, even if decision would not be the same on a fresh inquiry); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (purpose of doctrines of *res judicata and collateral estoppel* is to encourage reliance upon decisions); to same effect *see Reed v. Allen*, 286 U.S. 191, 198-201 (1932), *Kempe's Lessee v. Kennedy*, 5 Cranch (9 U.S.) 173, 186 (1809); *Nevada v. U.S.*, 463 U.S. 110, 128-130 (1983); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877) and *Fayerweather v. Ritch*, 195 U.S. 276 (1904).

with or without prejudice.[12] In fact, as such a dismissal would be on the basis of the exercise of discretion, and not on the basis of lack of jurisdiction, it cannot be assumed to be without prejudice unless clearly stated as such. Thus, the use of the words "without prejudice" is necessary to prevent the dismissal from being preclusive. (Circuit Judge Selya's decision thus goes beyond the Seventh Circuit decision in *Shaver*, which had no explicit reservation of the petitioner's right to sue again to disregard.)

Carl Kale's assertion that District Judge Skinner's dismissal of his state law claim "without prejudice" preserved his right to sue again elicited responses from District Judge Tauro and Circuit Judge Selya that disregarded it as non-binding *dicta*, though they both shied away from using that word, and stretched to find other words to label the express words of disposition unnecessary.

This was a major innovation, seriously limiting the reach of *res judicata*. The irreducible minimum of any decision is its disposition. If *that* can be treated as non-binding dicta, then no part of any decision is safe from this angle of attack.

The reasoning used in this case by Circuit Judge Selya creates a precedent for undermining every decision of every court everywhere. Despite his modest effort to portray it as a straightforward interpretation of *res judicata*, it is much broader than

---

[12]See fn. 22, to the work cited in n. 9 *supra*, arguing that such dismissals *should* make explicit whether they are intended to be with or without prejudice.

just the specific facts here, and puts him in the forefront of a major effort at law reform.

The broad impact of his decision can be seen once it is recognized that in every case there is *some* fact introduced by neither side. It is unlikely that if one side omits a key fact for its case that the other side would rush to introduce it.

If District Judge Skinner's use of the words "without prejudice" can be disregarded as *dicta*, then any plaintiff whose case was dismissed "with prejudice" due to a failure of his proof could come back later, after brooding over his case, and say that since there were facts that were not presented that would have led to a different result, the disposition should be not be considered binding, since all dismissals for insufficient proof are automatically with prejudice, making the use of those words "supererogatory."[13]

He would argue that, due to the defendant's failure to present the information that would have enabled the first court to fully adjudge whether or not his case really was worthless, the phrase "with prejudice" "could not have constituted an express [finding of no liability] since [the defendant] had withheld the very information which would have made such a [disposition] meaningful."[14]

He would, of course, quote Circuit Judge Selya's opinion, suggesting that what's sauce for the goose is

---

[13]Decision of the First Circuit, January 25, 1991, A-1, at A-13 to A-14.

[14]A-14.

sauce for the gander. Circuit Judge Selya's opinion thus sanctions such an effort by every disappointed litigant who concludes that direct appeal would be unavailing, as the first court had made no reversible error, but a second chance at a trier of fact, with better evidence, would do the trick.

To make a decision's finality depend on its correctness or the completeness of the information placed before the first court means that an assertion of *res judicata* adds nothing in any case. It amounts to an attempt to completely repeal the doctrine. (One of course assumes that it is made in a "good faith effort to extend, modify, or reverse existing law.")

II. THE RESPONDENT'S FAILURE TO EITHER ADVISE DISTRICT JUDGE SKINNER OF THE EXISTENCE OF DIVERSITY JURISDICTION TO SECURE A FINAL ADJUDICATION OR TO APPEAL HIS USE OF THE WORDS "WITHOUT PREJUDICE" SHOULD BAR IT FROM QUESTIONING THAT DISPOSITION.

It is hard to see why Circuit Judge Selya even reached the question of whether District Judge Skinner's incomplete information made his disposition meaningless, much less went out on a limb with his opinion, given Chief Judge Breyer's extraction from the respondent at oral argument of admissions that should be taken to have estopped it from raising this issue on the basis of estoppel by judgment and by its waiver of this issue previously.

It doesn't take much thought to figure out why the respondent didn't tell District Judge Skinner that

diversity jurisdiction existed — it would have resulted in the claim remaining open before him. But why didn't it bring it up in the first set of appeals, from District Judge Skinner's action, and argue there what it is arguing here?

The respondent's reply to Chief Judge Breyer when he asked that question at oral argument before the panel — that it didn't appeal because a prevailing party can't appeal a dismissal without prejudice — is not convincing.

First of all, it was wrong.[15]

---

[15] As Chief Judge Breyer correctly responded, "I've read my opinions, and they don't apply."

In re Public Service Co. of New Hampshire, 898 F.2d 1 (1st Cir. 1990), does contain broad dicta to the effect that a prevailing party can never appeal. However, appeal by a prevailing party of a final order that *could* have undesired collateral effects is not prevented either by the very different facts of that case — which refused to allow the appeal of the denial of a motion for leave for an interlocutory appeal, without prejudice to the later filing of a motion to enter final judgment to permit an appeal — nor by the explicit reasoning of the cases it relied upon directly, *Bath Iron Works Corporation v. Coulombe*, 888 F.2d 179 (1st Cir. 1989), and indirectly, *Balcom v. Lynn Ladder and Scaffolding Co., Inc.*, 806 F.2d 1127 (1st Cir. 1986) and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).

In fact, *Deposit Guaranty* allowed the prevailing party to appeal on just that basis. The existence of the instant case is a clear collateral effect of the dismissal "without

(continued...)

Secondly, another reason is much more plausible: like the petitioner, the respondent never anticipated the rule of preclusion it now argues he should have seen coming, something the respondent can't admit — because to do so would undercut application of that rule to the petitioner's case.

The respondent's failure to inform District Judge Skinner of the existence of diversity jurisdiction, in order to secure a final decision of all claims in the first proceeding, or to appeal his use of the words "without prejudice" directly, should estop it from collaterally attacking that dismissal's being without prejudice. That issue was expressly decided, even if on incomplete information, and should estop it on the basis of simple waiver.

Even if a court chooses to interpret the doctrine of *res judicata* so narrowly to ignore the explicit dismissal of the state claim "without prejudice," it may not then interpret that doctrine so broadly as to deny its normal exclusions from the rules of claim splitting.

The *Restatement of Judgments (Second)*, from which both District Judge Tauro and Circuit Judge Selya quoted the general rule against claim splitting, provides, as exceptions to the rule of bar not only § 26(1)(b) and § 20(b) just discussed, but also § 26(1)(a) for when:

---

[15](...continued)
prejudice" as a with prejudice dismissal would not have allowed a new suit to be filed.

(a) The parties have agreed in terms or effect that the plaintiff may split his claim, or the defendant has acquiesced therein;

It was admitted by the respondent at oral argument before the panel that it knew of the existence of diversity jurisdiction while the case was before District Judge Skinner. Thus, its failure to object to the dismissal without prejudice was a tacit acquiescence to this splitting of the petitioner's claims.

As noted in the Statement of the Case above, this cluster of issues was squarely before both District Judge Tauro and the First Circuit panel that decided the case, and cannot be disregarded on any argument that the petitioner has somehow waived it.

III. A Claim That Was Joined Under Pendent Jurisdiction Is Not Transformed Into An "Omitted Claim" Simply Because A Second Basis For Jurisdiction Existed.

The petitioner has no quarrel with authorities that say that all related claims must be asserted in one's first lawsuit or lost. However, to treat a claim as not asserted — when it *was* asserted but dismissed without prejudice — because only one of two bases for federal court jurisdiction was pled, is to treat the jurisdictional basis as part of the substantive claim.

It is "black letter law" that substance and procedure are separate. Were this not so, diversity actions would have to be tried in federal court under

the rules of procedure of the state whose law created the claim.

District Judge Tauro's and the First Circuit's uses of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) were totally incorrect, as (1) that case dealt with claims that had been entirely omitted from the first action and (2) the initial actions in that case had been dismissed "in their entirety" (452 U.S. at 396). (As noted above, *Moitie* actually supports the petitioner, as it stands for the proposition that a decision cannot be robbed of *res judicata* effect by saying it was wrong, which is what the First Circuit here did to District Judge Skinner's use of the words "without prejudice.")

Under the letter of the traditional rules of *res judicata*, the petitioner's state law claims are not precluded.

Both the First Circuit and District Judge Tauro rely, however, on the case of *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988), a two-to-one decision of three-member panel of the Seventh Circuit.

Shaver held, on a fact pattern similar to this one, that the failure of the plaintiff to have asserted diversity jurisdiction in addition to pendent jurisdiction over the state law claims filed in the federal action rendered the dismissal of the state law claims upon dismissal of the federal claim *res judicata*. *Shaver* held, as did the decisions here appealed from, that the duty to join all claims means that all possible jurisdictional bases must be joined, disregarding the distinction between rules of procedure and substantive claims. A bitter dissent in *Shaver* noted that the

other two Justices had reached out to decide this issue although the District Court had granted summary judgment on the merits to the defendant without reaching this issue, and pointed out that there was no authority for requiring the mandatory invocation of diversity jurisdiction rather than trying the remaining state claim in state court, citing *U.M.W. v. Gibbs*.

While the majority in *Shaver* tried to depict their holding as being based on "fundamental and substantial justice" (840 F.2d at 1368), the arbitrary impact of their rule cannot be ignored: Had diversity in *Shaver*'s (or Carl Kale's) original action been precluded by the joinder of a managerial employee as a co-defendant, the rule the *Shaver* majority perceived would not have protected the employer. What aspect of "fundamental and substantial justice" is implicated by allowing a defendant to benefit by the fortuity of whether or not another defendant had also been joined in an action that has long ago been dismissed?

Shaver's majority should have been frank enough to admit making new law, since they relied for authority on Professor Wright's treatise, not on any source of law. Their result cannot be said to be compelled by any rule of "fundamental and substantial justice," but was itself a "fundamental" departure from tradition.

In an effort to find other courts' treatment of the Seventh Circuit decision in *Shaver*, petitioner's counsel has repeatedly shepardized and conducted Lexis searches on all federal and state court decisions for citations to *Shaver*, most recently this

week. These searches found cases as recent as April 5, 1991, including *Shaver* itself, the opinions here appealed from, eight decisions of the Seventh Circuit, and seventeen decisions of district courts within that circuit. Only one state court decision was found. No decisions of federal courts outside the Seventh Circuit were found, other the denial of certiorari in *Shaver* itself and the opinions here appealed from.

Further, other than the decisions here appealed from no court — even within the Seventh Circuit — has relied on (or even referred to) the Seventh Circuit's departure in *Shaver*.

All but one of the other courts cited *Shaver* for traditional aspects of *res judicata* discussed in the lead-in to its departure from tradition.[16] (The exception was a citation, in *Mursch v. Van Dorn Company*, 851 F.2d 990 (7th Cir. 1988), of the *Shaver* dissent's observation that an employee handbook could become an express contract.)

---

[16]*Davis-Gilbert v. Alberto-Culver Co.*, No. 90-2727, 1991 U.S. App. LEXIS 6199, (7th. Cir., April 5, 1991); *Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc.*, 921 F.2d 732 (7th Cir. 1991); *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990); *Kotwitz v. Frank*, 902 F.2d 37 (7th Cir. 1990); *Gray v. Lacke, et al.*,885 F.2d 399 (7th Cir. 1989); *Crop-Maker Soil Services, Inc. v. Fairmount State Bank*, 881 F.2d 436 (7th Cir. 1989); and *Secon Service System, Inc. v. St. Joseph Bank and Trust Company, et al.*, 855 F.2d 406 (7th Cir. 1988).

Other than the opinions here appealed from, only Professor Wright has cited *Shaver* for the point in issue here (noting in his citation that *Shaver* had relied upon his treatise.)

To adopt the rule announced in *Shaver* would have the undesirable effect of *forcing* plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims. As a matter of judicial economy, this runs counter to the general effort to minimize the use of diversity jurisdiction.

However, if a Circuit chooses to do adopt *Shaver*, it may not do so retroactively. It may not deprive this plaintiff of his day in court where that day in court was expressly reserved to him by Justice Skinner.

It may not ambush the plaintiff by applying the unprecedented March 2, 1988 *Shaver* decision to a case that was filed in 1985 and dismissed in 1986. Had the petitioner any inkling that such a case was on the horizon, diversity jurisdiction would have been asserted along with pendent jurisdiction. The courts below argue that nothing prevented the petitioner from doing so. However, until now, nothing indicated that it would be necessary to do so. Indeed, the oft-expressed preference of federal courts that purely state law cases should be tried in state courts indicated that it would, in fact, be undesirable to do so, being preferable to go to state court with the case if appeal of the dismissal of the federal claim was unsuccessful.

As the general sentiment in the federal courts has been one of hostility to the use of diversity jurisdic-

tion, it is hard to understand why a rule should be adopted to *require* its assertion, rather than to allow a case to be taken back to the state courts after the federal claim involved is dismissed.

The petitioner went to state court with this action because it was clear that an argument could be made that he had waived diversity jurisdiction by not asserting it in his first action. It is the respondent that has asserted diversity jurisdiction here, not the petitioner.

If the rules of compulsory joinder are to be extended to jurisdictional bases as well as claims, it should be done only prospectively. Such a change in the law *may not* be put into effect retroactively. As can be seen here, the effect of such retroactive application is impermissibly harsh and unpredictable, as it robs Justice Skinner's disposition of its intended effect and deprives the petitioner of his day in court.

To change the rules retroactively, on the thinnest of precedent, while pretending that no change has been made, to foreclose a case that was expressly held open, was the grossest abuse of discretion.

Conclusion.

If any reason is needed to invoke this Court's review in this case, the most basic is that the opinions here appealed from attack the root purpose behind the rules of *res judicata* — to protect the parties' right to clarity and certainty of result.

To first deny *res judicata* effect to a decision to dismiss without prejudice on the basis that it was in error, and then to retroactively expand the doctrine

of *res judicata* to convert that dismissal into a dismissal with prejudice is to appropriate the doctrine's name to oppose both its traditional rules and its root purpose.

PHILIP R. OLENICK
[Counsel of Record]
PAUL L. NEVINS
40 Court Street-Suite 926
Boston, MA 02108
(617) 720-4100
Attorneys for Petitioner

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appendix to Petition for Writ of Certiorari

PHILIP R. OLENICK
[Counsel of Record]
PAUL L. NEVINS
40 Court Street-Suite 926
Boston, MA 02108
(617) 720-4100
Attorneys for Petitioner

May 28, 1991

Appendix.

United States Court of Appeals
For the First Circuit

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee

January 25, 1991

[924 F.2d 1161]

Appeal from the United States District Court for the District of Massachusetts
[HON. JOSEPH L. TAURO, *U.S. District Judge.*]

Before
BREYER, *Chief Judge,*
COFFIN, *Senior Circuit Judge,*
and SELYA, *Circuit Judge.*

Philip R. Olenick, with whom *Paul L. Nevins* was on brief, for appellant.

Kenneth M. Bello, with whom *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.* was on brief, for appellee.

SELYA, *Circuit Judge.* This appeal presents an issue of first impression in this circuit. Believing, as we do, that a straightforward application of the hoary doctrine of *res judicata* is dispositive of the question raised, we affirm the district court's dismissal of plaintiff's civil action.

I. BACKGROUND

At all times material hereto, plaintiff-appellant Carl Kale has been a citizen and resident of Massachusetts. He was formerly employed by defendant-appellee Combined Insurance Company of America (Coinco), a "citizen" of Illinois. See 28 U.S.C. § 1332(c) (specifying method of determining corporation's citizenship for purposes of diversity jurisdiction). In May 1983, after some two decades with Coinco and its predecessor in interest, appellant was cashiered.

Seeking vindication, Kale filed suit in the United States District Court for the District of Massachusetts. He pled federal question jurisdiction, 28 U.S.C. § 1331, and alleged that his firing violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. He adorned his ADEA complaint with pendent state-law claims for intentional infliction of emotional distress and breach of an implied covenant of good faith and fair dealing (predicated upon Coinco's alleged failure to abide by promises made in its personnel manual). The case was assigned to Judge Skinner. The state-law claim for intentional infliction of emotional distress was voluntarily discontinued at a relatively early date. Later

on, Judge Skinner granted summary judgment, finding the federal statutory claim to be time-barred.

Inasmuch as Kale's complaint to all intents and purposes asserted only federal question jurisdiction,[1] rejection of the ADEA count seemingly ended the federal court's interest in the matter; at any rate, Judge Skinner dismissed the appended state-law claim at that juncture, writing: "Since I have disposed of plaintiff's lone federal claim, I now dismiss without prejudice [the remaining] state cause of action over which there was only pendent jurisdiction." Appellant — who does not dispute that he knew at the time that diversity of citizenship existed — did not alert the court to, or make any effort to assert the presence of, diversity jurisdiction, 28 U.S.C. § 1332(a). By the same token, he neither sought reconsideration of, nor appealed, the dismissal of his state-law claim. He did appeal the entry of summary judgment on the ADEA claim. He lost. *See Kale v. Combined Ins. Co.*, 861 F.2d 746, 750-56 (1st Cir. 1988). That ended the original action (which we will henceforth refer to as "*Kale I*").[2]

---

[1]The appellant did mention 28 U.S.C. § 1332 in a string citation in his original complaint. See *Kale v. Combined Ins. Co.*, 736 F. Supp. 1183, 1184 n.3 (D. Mass. 1990) (describing original complaint). But, this cursory reference was totally inadequate to put the district court on inquiry notice.

[2]In the appeal, we also dealt with Coinco's request that the plaintiff be sanctioned. *See Kale I*, 861 F.2d at

(continued...)

The waters did not remain placid for long. In May 1989, Kale filed a new suit in a Massachusetts state court, alleging a tsunami of state-law claims, e.g., breach of contract (based on the personnel manual), promissory estoppel, tortious breach of the implied good faith/fair dealing covenant. Diversity jurisdiction being apparent from the face of the record, Coinco removed the case to the federal district court. *See* 28 U.S.C. §§ 1332(a), 1441. It then moved to dismiss the action based on the preclusive effect of *Kale I*. The district court (Tauro, U.S.D.J.) granted the motion, ruling that the failure to bring the state-law claims under diversity jurisdiction in Kale I barred the assertion of those claims in another, later proceeding. *See Kale v. Combined Ins. Co.*, 736 F.Supp. 1183 (D. Mass. 1990) (*Kale II*). This appeal followed.

II. QUESTION PRESENTED

In framing the issue on appeal, we think it useful to begin by cataloguing what is not legitimately at issue.

1. There is no dispute that the plaintiff could have established diversity jurisdiction in *Kale I*, but failed properly to plead it. *See Kale II*, 736 F. Supp. at 1184 & n.3. Indeed, the record does not indicate

---

[2](...continued)
756-61. The matter of sanctions is immaterial for present purposes.

that Kale at any time alerted Judge Skinner to the existence — or even the possibility — of diversity jurisdiction.

2. Kale has never contended that his claims, or any of them, were so lacking in value as to fall below the "amount in controversy" requirement for diversity jurisdiction, *see* 28 U.S.C. § 1332(a).

3. It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect. *See, e.g., Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (listing cases that illustrate trend towards giving claim-preclusive effect to dismissals based on statutes of limitations), *cert. denied*, 476 U.S. 1159 (1986); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (per curiam); cf. Fed. R. Civ. P. 41(b). Thus, the disposition of the ADEA claim in *Kale I* comprised a suitable springboard for the deployment of res judicata.

4. The parties agree that, given the contours of the *Kale I* record, Judge Skinner had every right to dismiss the state-law claim without prejudice once the federal cause of action was resolved on the merits. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In any event, Kale did not appeal from the dismissal order.

5. It is also uncontested that the implied contract claim in *Kale II* was pleaded and dismissed in *Kale I*. While the parties do dispute whether the other state-law claims pleaded in *Kale II* were "brought" in *Kale I*, we need not enter that debate. The judgment in *Kale I* was rendered by a federal court acting under its federal question jurisdiction. Hence, the avail-

ability of a *res judicata* defense in this case depends on the federal-law standard. *See, e.g., Cemer,* 583 F.2d at 832. Once there has been an adjudication on the merits, federal law stipulates that all claims which are "part of the same cause of action" are extinguished, whether or not actually asserted in the original action. *See Nilsen v. City of Moss Point,* 701 F.2d 556, 562 (5th Cir. 1983) (en banc); *see also Lovely v. Laliberte,* 498 F.2d 1261, 1263 (1st Cir.), *cert. denied,* 419 U.S. 1038 (1974); *cf. Fiumara v. Fireman's Fund Ins. Cos.,* 746 F.2d 87, 91 (1st Cir. 1984) (same; New Hampshire law); *Isaac v. Schwartz,* 706 F.2d 15, 16 (1st Cir. 1983) (same; Massachusetts law). In other words, the doctrine of *res judicata,* in its federal formulation, insists that the decision in *Kale I* must preclude in a subsequent suit (1) all claims which were actually brought in *Kale I* and (2) all related claims, i.e., all claims arising out of the same cause of action.

6. Whatever the relationship between the state-law claims asserted, variously, in the two complaints, it is beyond cavil that, at the very least, the claims pleaded in *Kale II* could all have been joined in Kale's original complaint. *See* Fed. R. Civ. P. 8(e)(2) (a plaintiff may set forth multiple statements of claim in a single complaint); Fed. R. Civ. P. 18(a) (a party may join in a single action "as many claims . . . as the party has against an opposing party").

Having tapered the lens of inquiry, it can be seen that this appeal, stripped to bare essentials, presents the following question: when a state-law claim, originally brought pendent to a federal claim, is dismissed without prejudice for want of subject

matter jurisdiction following rejection of the joined federal claim on the merits, under circumstances where the plaintiff could have asserted an alternative jurisdictional basis but did not, and the plaintiff thereafter brings a new suit against the same defendant which includes the pendent state-law claim as well as other state-law claims which could have been pleaded in the initial suit; *quaere:* are the state-law claims in the second suit precluded by the original adjudication? Put another way, should the judgment in *Kale I* be accorded preclusive effect with respect to the claims asserted in *Kale II*, inasmuch as those claims could have been prosecuted in *Kale I* had the plaintiff elected to plead an available alternative basis for jurisdiction?[3]

III. ANSWERING THE QUESTION

We answer the question presented in the affirmative, holding that when a plaintiff pleads a claim in federal court, he must, to avoid the onus of claim-splitting, bring all related state claims in the same

---

[3]It makes no theoretical difference that *Kale II* was removed to a federal venue. Had Coinco not removed the case, the result in the state superior court should be identical to the result reached here. After all, *Kale I* ended in a federal judgment and Massachusetts law provides for the application of federal *res judicata* principles when the "preclusive effect of a Federal court's judgment" is at issue. *See Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164, 1167 (1982).

lawsuit so long as any suitable basis for subject matter jurisdiction exists. We reach this conclusion without special deference to the decision below. The case was decided on a motion to dismiss brought under Civil Rule 12(b)(6) and appellate courts ordinarily review such rulings *de novo*. *See Gonzalez-Bernal v. United States*, 907 F.2d 246, 248 (1st Cir. 1990); *see also Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990) ("[i]n the Rule 12(b)(6) milieu, an appellate court operates under the same constraints that bind the district court").[4]

A.

We start our analysis with some abecedarian truths. Under a federal-law standard, the essential elements of claim preclusion are (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suits; and (3) an identity of parties or privies in the two

---

[4]Even if the submission of counsel's affidavit, containing copies of relevant *Kale I* materials, effectively converted the motion into a summary judgment motion, see Fed. R. Civ. P. 12(b), the standard of appellate review would remain the same. *See, e.g., Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990) (appellate review of summary judgment is plenary); *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989) (same).

suits. *See In re Air Crash at Dallas/Fort Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984); *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). Two elements are unarguably in evidence here. First, there was a final judgment in *Kale I*, comprising an adjudication on the merits for purposes of claim preclusion. *See supra* pp. 4-5. Second, there was an absolute identity of parties in *Kale I* and *Kale II*. Any hope of avoiding preclusion must, therefore, rest with the least mechanical of the three requirements: identity of cause of action.

Concededly, the phrase "identity of cause of action" is more easily stated than defined. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 944 (7th Cir. 1981). A single cause of action can manifest itself in an outpouring of different claims, based variously on federal statutes, state statutes, and the common law. *See Athlone*, 746 F.2d at 983. Yet, such heterogeneity alone does not work an exception to the rule of preclusion. So long as different theories of recovery, howsoever prolific, derive from the same cause of action, the requisite identity is achieved if, and to the extent that, all such theories concern "the same operative nucleus of fact." *Lovely*, 498 F.2d at 1263. In other words, as long as the "new complaint grows out of the same 'transaction or series of connected transactions' as the old complaint," *Isaac*, 706 F.2d at 17 (quoting Restatement (Second) of Judgments § 24), the causes of action are considered to be identical for *res judicata* purposes. Thus, if the claims asserted in

Kale I and *Kale II*, respectively, were sufficiently related, that is, if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong, the two suits advanced the same cause of action notwithstanding any differences in remedies sought or theories of recovery pleaded. *A fortiori*, our focus must not be the theoretical raiment in which the claims are robed, but "whether the underlying facts of both transactions were the same or substantially similar." *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 6 (1st Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986).

In light of the foregoing, it necessarily follows that a particular legal theory not pressed in the original suit will nonetheless be precluded in the subsequent one if it prescinds from the same set of operative facts. *See, e.g., Cemer*, 583 F.2d at 832 ("Where two successive suits seek recovery for the same injury, a judgment on the merits operates as a bar to the later suit, even though a different legal theory of recovery is advanced in the second suit."). In this way, the law prevents a litigant from claim-splitting, requiring that he "assert all his various legal theories and factually related allegations the first time he brings suit." *Rose*, 778 F.2d at 79.

We turn from the general to the specific. It is nose-on-the-face plain that the claims in *Kale II* stemmed from the same transactional hub as the claims previously mounted in *Kale I*. Though dressed in somewhat different garb, the claims all sought recovery in consequence of the same occurrence: defendant's unilateral termination of the plaintiff's employment.

The differences were differences in the theories of liability and the selection of remedies, not differences in the fundamental cause of action. As the district court found, there was an identity of cause of action. *See Kale II*, 736 F. Supp. at 1185-86 & n.7.

It appears, then, that all the elements of classic claim preclusion are present in this situation. Unless *res judicata* is to be robbed of its doctrinal significance, appellant had an obligation to cluster his theories of recovery in *Kale I*, by whatever necessary jurisdictional means, or else forever hold his peace.

B.

Existing precedent, though scanty, supports such a preclusionary result. The only case directly in point — and it could hardly be more so — is *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988). There, the situation was virtually identical. Shaver, a discharged employee, sued for age discrimination in the district court, asserting federal question jurisdiction and joining pendent state claims. *Id.* at 1363. The district court granted summary judgment in defendant's favor, finding Shaver's ADEA claim untimely. *Id.* The court declined to exercise pendent jurisdiction over the state claims and dismissed them. Id. Shaver, who realized "that diversity jurisdiction existed," *id.* at 1364 n.1, made no effort "to allege an alternative jurisdictional basis in an attempt to pursue his state law contract claims" in the original

action. *Id.* at 1363. Instead, he brought a fresh suit in the state court alleging a variety of state-law claims. *Id.* As here, the defendant removed the case to the federal district court pursuant to 28 U.S.C. §§ 1332, 1441.

The district court in the second *Shaver* case granted summary judgment on grounds independent of *res judicata*. The Seventh Circuit, however, went directly for the jugular, holding squarely that:

> Because Shaver neglected to assert the existence of diversity jurisdiction in his prior action in order to pursue his breach of contract claims, both the strict test of and the policy behind the *res judicata* doctrine bars the present action.

Shaver, 840 F.2d at 1368; *see also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4412 at 67-68 n.0.6 (Supp. 1990) (discussing *Shaver* with approval).

Appellant does not dispute that *Shaver* is on all fours with his case. Rather, he claims it was wrongly decided. We do not agree. In our view, the reasoning of the *Shaver* majority, 840 F.2d at 1364-68, is impeccable. We adopt it enthusiastically, without exegetic discussion. There is simply no point in attempting to reinvent so well-fashioned a wheel.

Appellant also essays an end run around *Shaver*, arguing that, even if *Shaver* is good law, he could not reasonably have been expected to anticipate the holding.[5] Whatever the merits of the Seventh

---

[5]*Shaver* was decided well after Judge Skinner dismissed the state-law claim in *Kale I*.

Circuit's opinion, appellant's thesis runs, a grave injustice would result from "retroactively" foisting the *Shaver* rule upon him. The plea holds little water. While the circumstances of Kale's case are admittedly unusual, the doctrine governing its resolution is quite mature and unencumbered by contradictions or ambiguities in respect to the question at hand. Rather than emanating from some dark interstice of the law, the district court's holding in *Kale II* was entirely predictable. So, too, was the outcome in *Shaver*. There is no unfairness, under all the circumstances, in declining to extricate the plaintiff from a self-dug hole.

C.

Appellant is not short of fall-back positions. He contends that, even if the rule is as we envision it, his case is outside the rule because Judge Skinner dismissed the state-law claim in *Kale I* "without prejudice." This contention represents an unvarnished attempt to squeeze an elephant's foot into a pony's shoe. To be sure, claim preclusion can be avoided where "the court in the first action has expressly reserved the plaintiff's right to maintain the second action." Restatement (Second) of Judgments § 26(1)(b) (1982). But, the exception does not pertain here. Judge Skinner's use of the phrase "without prejudice" was supererogatory, because the dismissal of pendent claims on jurisdictional grounds is always without prejudice. *See* Fed. R. Civ. P. 41(b); *see also United Mine Workers*, 383

U.S. at 726-27; *Rose*, 778 F.2d at 79. Thus, the phrase "without prejudice" added nothing to what transpired. In any event, the phrase could not have constituted an express reservation, as Kale had withheld from the judge the very information which would have made such a reservation meaningful. *See infra* Part III(D).

D.

Appellant's next initiative hawks a further exception to claim preclusion. In general, the rule requiring all claims arising from a single cause of action to be asserted in a single lawsuit will not apply if the plaintiff was unable to assert a particular claim or theory in the original case "because of the limitations on the subject matter jurisdiction of the courts." Restatement (Second) of Judgments § 26(1)(c) (1982). This jurisdictional competence exception permits the maintenance in a second suit of a claim stemming from the cause of action previously sued upon "if a jurisdictional obstacle has precluded raising that issue in the first action." *Pasterczyk v. Fair*, 819 F.2d 12, 14 (1st Cir. 1987).

For the jurisdictional competence exception to flower, it must be shown that the claim pressed in the second suit could not have been asserted and resolved in the first suit by reason of limitations on the first court's jurisdiction. This determination must be made by the second court, giving preclusive effect to any jurisdictional determinations made by the first court (so long as the requirements of collat-

eral estoppel, i.e., issue preclusion, have been met).[6] Accordingly, when *Kale II* arose, it was up to Judge Tauro to determine whether the nonfederal claims could have been litigated in *Kale I* if the plaintiff had chosen to engage the district court's diversity jurisdiction, and if so, the legal effect of that fact.

Judge Tauro's response was patently correct on all scores. The existence of an alternate hook on which federal court jurisdiction could have been hung, permitting state-law claims to be freely litigated in a federal forum, rendered the competency exception inapplicable. After all, for it to pertain, the jurisdictional obstacle to joinder of all claims must be attributable to limitations on the first court's power to hear and decide a claim rather than to a party's contrivance.

---

[6]There was no issue preclusion applicable to the defense raised in *Kale II*. Since Judge Skinner was not made aware of the existence of diversity jurisdiction, his dismissal could only have been based on the special nature of pendent jurisdiction. Thus, the only preclusive effect the dismissal could have would be to forestall litigation of that particular issue, not the broader issue of whether jurisdiction could have been achieved in some other way. So, while *Kale I* finally determined that there was no pendent jurisdiction for the state-law claim, it did not in any way purport to determine that nonfederal claims could not otherwise have been brought within the district court's subject matter jurisdiction.

E.

There is one last arrow in appellant's quiver. He importunes that, regardless of ordinary rules of *res judicata*, the equities demand that his current suit be given free passage. This entreaty overlooks, however, that the doctrine of *res judicata* is no "mere matter of practice or procedure," but "a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). Although we have recognized the existence of judicial power to make an "occasional exception" to claim preclusion in order "to prevent unusual hardship," *Rose*, 778 F.2d at 82, this case does not fit that narrow mold. Appellant knew of the existence of diversity jurisdiction in *Kale I* and chose not to assert it.It was this choice — and this choice alone — that led to Judge Skinner's order of dismissal. In short, appellant's splitting of his claims was voluntary: he had a full and fair opportunity to litigate all his claims in *Kale I*, but declined to avail himself of it.

We see no injustice in applying time-honored principles of claim preclusion in such a situation. Whenever a litigant decides to enter the court system to seek justice, he must play by the rules. Any idiosyncratic unfairness that may result from the consistent and straightforward application of preclusion principles is, we think, far outweighed by the systemic benefits which flow from steadfast adherence

to so salutary a doctrine. *See Moitie*, 452 U.S. at 401-02. As *Rose* teaches:

> [I]f courts relaxed the principles of claim preclusion every time it appeared that a litigant had a strong claim 'on the equities,' the doctrine would fail to serve its purposes of promoting judicial economy and repose. In some individual instances a fairer result might be achieved, but more often the litigation of stale claims and the resulting uncertainty would mean injustice or hardship.

778 F.2d at 82. There is no basis for abandoning the rules in this case.

IV. CONCLUSION

We need go no further. Appellant's failure to assert diversity jurisdiction when it unarguably existed, and he knew as much, gave the judgment in *Kale I* wide-ranging preclusive effect. *Kale II*, therefore, exemplified the classic claim preclusion paradigm. Because of this, and because the case did not fall within an exception to the normal rules of *res judicata*, Judge Tauro's dismissal order was wholly appropriate.

Affirmed.

Appendix.

United States District Court
District of Massachusetts

Carl Kale,
Plaintiff,

v. CA No. 89-1640-T

Combined Insurance
Company of America,
Defendant

MEMORANDUM
May 1, 1990

[736 F. Supp. 1183]

TAURO, D.J.

Plaintiff, Kale is a Massachusetts resident and a twenty year employee of Defendant and its predecessor-in-interest. In May 1989, he brought an action in Middlesex County Superior Court alleging a host of state law claims stemming from his employment termination in March 1983. Defendant, Combined, an Illinois corporation with a principal place of business in that state, timely removed the action to this court on the basis of diversity of citizenship.

Appendix.

Now, Combined asks this court to dismiss this case on *res judicata* grounds.[1] It argues that the claims raised now by Kale could have been asserted in a 1985 federal suit filed by him, that was later dismissed by Judge Skinner in September 1986. Combined argues further that Kale's failure to raise these claims in the 1985 suit precludes them now.

This motion to dismiss raises the novel question of whether a plaintiff asserting federal question jurisdiction in federal court must, on pain of later preclusion, also assert diversity jurisdiction, where available, in order to join all related state claims.

I.

Back in May 1985, Kale filed a civil action in the United States District Court for the District of Massachusetts, alleging that his employment was terminated in violation of the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 621, *et seq. See Carl Kale v. Combined Insurance Company of America*, C.A. No. 85-1840-5 (D. Mass. dismissed Sept. 26, 1986) (Skinner, J.) [*"Kale I"*]. In addition, Kale's complaint raised state law claims of intention-

---

[1]Here, *res judicata* is used in its narrower sense to describe the doctrine of claim preclusion pursuant to which "a final judgment on the merits bars a new suit on the same claim or cause of action." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.401 n. 13 (2d ed. 1984).

al infliction of emotional distress and breach of the covenant of good faith and fair dealing.[2]

With respect to the state claims, Kale asserted discretionary pendent jurisdiction. Diversity jurisdiction was never properly plead.[3]

Kale I's ADEA claim was dismissed as timebarred. See *Kale I, aff'd*, 861 F.2d 746 (1st Cir. 1988). With the lone federal claim gone, the court, having no apparent independent jurisdictional basis for adju-

---

[2]The claim for intentional infliction of emotional distress was voluntarily dismissed on October 8, 1985.

[3]Although Kale nominally cited 28 U.S.C. § 1332 among a list of jurisdictional citations in his original federal complaint, he failed to make the requisite pleading as to jurisdictional amount. *See* 28 U.S.C. § 1332(a). The burden of proving the existence of the elements necessary for diversity jurisdiction, of course, lies with the pleader. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (finding plaintiff responsible for claiming the sufficiency of jurisdictional amount); *Topp v. CompAir, Inc.*, 814 F.2d 830, 839 (1st Cir. 1987). Kale made no formal allegation that he had met the jurisdictional amount requirement. *See Berman v. New Hampshire Jockey Club, Inc.*, 292 F. Supp. 993, 998 (D.N.H. 1968). Moreover, the only specific monetary claim in the complaint which could colorably satisfy the jurisdictional amount pleading requirement was a $1,000,000 claim for intentional infliction of emotional distress. This claim was voluntarily dismissed by Kale nearly one year before Judge Skinner allowed the motion for summary judgment in *Kale I*. No jurisdictional amount remained, therefore, once the intentional infliction claim was excised.

dicating the related state claims, declined to exercise pendent jurisdiction. *Id.* (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). With respect to these state claims, the court purported to dismiss them "without prejudice."

In this action, *Kale II*, which was removed from state court on the basis of diversity of citizenship,[4] plaintiff asserts several state law claims of wrongful termination.[5] Combined moves to dismiss because the claims raised in *Kale II* should have been included in the *Kale I* action. It contends that, had diversity jurisdiction been plead in *Kale I*, the state law claims could have been adjudicated on the merits. And so, because the pendent state claims *could* have been adjudicated in *Kale I*, pursuant to the court's mandatory diversity jurisdiction, they are now barred.

Kale's response is that the court in *Kale I* specifically dismissed the state claims "without prejudice."

---

[4]Kale has never disputed that diversity jurisdiction was available in both *Kale I* and *Kale II*.

[5]Specifically, Kale seeks a declaration that he had the right to continued employment terminable only for just cause, and that Combined was bound to its predecessor-in-interest's promise that Kale's employment was extended and maintained on that basis. Counts I, II. Counts III, IV, and V claim breach of an implied contract, an oral contract, and an employment contract, respectively. Count VI charges Combined with having negligently breached both the implied covenant of good faith and fair dealing and specific contractual rights. Finally, count VII alleges promissory estoppel.

He argues, that these wholly state-created claims cannot now be barred by the fortuity of defendant's having removed *Kale II* to federal court.[6]

III.

Res judicata is a firmly rooted rule of "'fundamental and substantial justice,'" not "'a mere matter of practice or procedure inherited from a more technical time than ours.'" *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Indeed, once the elements for claim preclusion have been established, there is little room for the making of "'ad hoc determination(s) of the equities in a particular case.'" *See Rose v. Town of Harwich*, 778 F.2d 77, 82 (1st Cir. 1985)

---

[6]At oral argument, Combined expressly contested the suggestion that, had they allowed the suit to go forward in state court, a divergent result on *res judicata* grounds would have been permissible. Its counsel stressed that a state court would have been compelled to raise the same bar against any claims which could have, and thus should have, been raised in *Kale I*. *See Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164 (1982) (ruling that preclusive effects of a federal judgment should be determined under federal law, and that failure to assert state claims under federal court's pendent jurisdiction raised bar to second action in state court).

(quoting Moitie, 452 U.S. 394 at 401). Because public policy demands that there be an end to litigation, the doctrine has been consistently invoked to "protect adversaries from the expense and vexation attending multiple lawsuits," "conserve[] judicial resources," and "foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Walsh v. International Longshoremen's Assoc., Local 799*, 630 F.2d 864, 867-68 (1st Cir. 1980) (citations omitted). *See also Allen v. McCurry*, 442 U.S. 127 (1980).

A claim is deemed precluded when there is: "(1) identity or privity of the parties to the action; (2) identity of the causes of action; and (3) a prior judgment on the merits." *Associated General Contractors v. Boston District Council of Carpenters*, 642 F. Supp. 1435, 1438 (D. Mass. 1986).

Here, the parties are identical. No one argues otherwise, nor does this suit's caption differ from the original one.

With respect to the identity of claims, the Restatement (Second) of Judgments makes clear that claims or causes of action are identical for claim preclusion purposes when they are "part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments,§ 24(1) (1980). *See also Rose*, 778 F.2d at 79. Applying the federal definition of a claim or cause of action, *Kale I* and *Kale II* arise from the same core of operative facts — Combined's termina-

tion of Kale — and as such, constitute the same claim.[7]

Lastly, the dismissal of *Kale I* on statute of limitations grounds constituted a valid and final judgment. There is overwhelming support for giving preclusive effect to dismissals based on the statute of limitations. *See Thompson Trucking, Inc. v. Dorsey Trailers*, 880 F.2d 818 (5th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989); *PRC Harris v. Boeing Co.*, 700 F.2d 894 (2d Cir. 1983); *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979); *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978); *Chang v. Northwestern Memorial Hosp.*, 549 F. Supp. 90 (N.D.Ill. 1982); 18 C. Wright, A. Miller & E. Cooper, 18 *Federal Practice and Procedure*, § 4441 (1981) [Wright & Miller]. *Cf. Rose*, 778 F.2d at 80 ("For one thing, our survey of

---

[7]Even though some different claims are raised in the second action, for purposes of claim preclusion they are nonetheless the same:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kind of relief.

Restatement (Second) of Judgments, § 24(2) comment c.

recent cases suggests a clear trend toward giving preclusive effect to dismissals based on the statute of limitations.") Once there is such an adjudication on the merits, all related claims that could have been brought are extinguished. *See Moitie,* 452 U.S. 394 at 398; *Isaac v. Schwartz,* 706 F.2d 15, 17 (1st Cir. 1983) ("The issue is not whether the plaintiff in fact argued his . . . claims in the [first] proceeding, but whether he could have.'") (quoting *Lovely v. Laliberte,* 498 F.2d 1261, 1263 (1st Cir. 1974)); Restatement (Second) of Judgments, § 24(1); Wright & Miller, §4411 at 86 ("A second action may be precluded on the ground that the same claim or cause of action was advanced in the first action even though a different source of law is involved.")

IV.

Combined's motion to dismiss theorizes that not only all legal theories should have been brought in *Kale I,* but also that all jurisdictional bases, including diversity jurisdiction, should have been asserted as well. This court agrees. Indeed, several Supreme Court Justices have expressed this view with respect to the assertion of contingent pendent jurisdiction in an original federal question case.[8] *See Moitie,* 452

---

[8]In *Moitie,* after a federal antitrust action was dismissed for failure to assert a proper injury, a second action removed to federal court asserting state law theories was *res judicata.* The majority believed that it only needed to

(continued...)

U.S. 394 at 404 (Blackmun, J., with whom Marshall, J. joins, concurring in judgment) ("The dismissal of *Brown I* is *res judicata* not only as to all claims respondents actually raised, but also to all claims that could have been raised."). *Id.* 452 U.S. at 411 (Brennan, J., dissenting) ("[I] would hold that the dismissal of *Brown I* is *res judicata* not only as to every matter that was actually litigated, but also as to every ground or theory of recovery that might have been presented.").[9]

The only Circuit Court of Appeals answering this question with respect to diversity jurisdiction has held that a failure to assert the existence of diversity jurisdiction over state claims in a prior federal action precludes their assertion in a second action. *See Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988). The facts of *Shaver* are extraordinarily similar to those here. There, too, a federal

---

[8](...continued)
reach the question of whether the federal law claims were precluded. It left unanswered the question whether the state claims were also foreclosed. On remand, however, the Court of Appeals, agreeing with the reasoning of Justice Blackmun's concurrence, ruled that the state claims were *res judicata*.

[9]Courts of Appeals have reached the same result. *See, e.g., Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981) (failure to assert discretionary pendent jurisdiction barred second action); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same).

action under the ADEA and various pendent state claims was brought by a former employee. After finding the federal claim time-barred, the district court refused to exercise pendent jurisdiction over the state claims. A second action brought in state court was removed to federal court on the basis of diversity of citizenship. Once there, the defendant moved for summary judgment on *res judicata* grounds and on the merits. Passing over the *res judicata* issue, the district court entered a summary judgment in defendant's favor on the merits.

The Court of Appeals for the Seventh Circuit, believing that the lower court should have avoided deciding the state law issues if it could have ruled solely on *res judicata* grounds, likewise dismissed the second suit, but for reasons of claim preclusion.[10]

V.

Even when, as here, the preconditions for preclusion are met, some courts have recognized the necessity of an "occasional exception to prevent undue hardship." *See Rose*, 778 F.2d at 82. *See also Moitie*, 452 U.S. 394 at 403 (Blackmun, J., with

---

[10]Professors Wright and Miller, commenting on the *Shaver* decision, agree that "a plaintiff who could invoke both federal and diversity jurisdiction should not be allowed to bypass the opportunity to secure a single adjudication of all claims." Wright & Miller, § 4412 at 67-68 n. 0.6 (Supp. 1990).

whom Marshall, J. joins, concurring in judgment). *Rose* would require a plaintiff to show clearly and convincingly that the policies favoring preclusion in the second action are outweighed by an extraordinary reason. *Rose*, 778 F.2d at 82 (citing Restatement (Second) of Judgment, § 26(1)(f)). This is not such a case. There were no jurisdictional obstacles to Kale bringing his state claims under the district court's mandatory diversity jurisdiction.[11]

Similarly, Kale cannot complain that he was " 'caught in a mesh of procedural complexities.' " *Mottle*, 452 U.S. 394 at 403 (quoting *Reed v. Allen*, 286 U.S. 191 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting)). The application of *res judicata* to this case is not unduly formalistic, but rather flows as a natural consequence of the application of claim preclusion.[12]

Kale also appears to argue that the policy behind *res judicata* is not served in this case. Specifically,

---

[11]Kale's failure to join all theories and jurisdictional bases might have been forgivable if he had a good reason for not being aware of the opportunity to assert diversity jurisdiction. *See* Wright & Miller, § 4412 at 68 n. 0.6 (Supp. 1990). He knew that the parties had diverse citizenship, and indeed made a failed attempt at claiming such jurisdiction.

[12]Indeed, as Wright and Miller explain, where a federal court has full, independent jurisdiction over all legal theories (i.e., federal question and diversity jurisdiction), "several decisions have ruled that . . . there is a single claim, all parts of which must be presented to the first court chosen." Wright & Miller, § 4412 at 95.

Kale contends that if there had not been complete diversity, his second action would not have been barred. That argument, however, misses the point. The policies of efficiency, fairness, and repose are served by application of the *res judicata* bar. *See Shaver*, 840 F.2d at 1367 n.2 ("Multiple lawsuits in separate forums, as well as requiring more than one court to analyze and digest the facts of a case, all have the effect of harassing defendants and wasting judicial manpower — the precise dangers the doctrine intends to prevent."). The doctrine of claim preclusion requires that, barring a jurisdictional obstacle, a plaintiff allege all legal theories for relief flowing from a transaction or series of transactions in his first *voluntarily chosen* forum.[13]

Relying on the dissenting opinion in *Shaver*, Kale also contends that the prohibition against claim-splitting should not apply when the claims are involuntarily split. The case cited on this point by the Shaver dissent, *Nilsen v. City of Moss Point, Miss.*,

---

[13]At least one case goes far further than the rule articulated today. *See Falk v. State Bar of Michigan*, 631 F. Supp. 1515, 1521 (W.D. Mich. 1986) ("Plaintiff should not be allowed to hale defendant into a second court simply because the first court in which he chose to sue defendant could not consider all the various theories arising from his single cause of action."). *But see Wright & Miller*, § 4412 at 66 (Supp. 1990) ("It is clear enough that a litigant should not be penalized for failing to seek a unified disposition of matters that could not have been combined in a single proceeding."); Restatement (Second) of Judgments, § 26, comment c.

701 F.2d 556, 563 (5th Cir. 1983), stated a general rule that pendent claims that a federal court refused to entertain should not later be barred. That rule makes sense because, in such a case, a party would have been unable, "through no fault of his own," to have the claims adjudicated in the first forum. *Id.* at 563. In *Nilsen*, however, it was "not the procedural system of the forum that precluded the joinder of all asserted remedies in one proceeding . . . ." *Id.* The court pointed out that "the system itself was . . . ready and able to accommodate [plaintiff's] claims . . . ." *Id.* Instead, it was the plaintiff who split her claim. Similarly, here, the claim-splitting was voluntary. Kale chose the federal forum and then elected to forego his right to invoke mandatory diversity jurisdiction.

Finally, Kale argues that his second action must not be precluded because his pendent state claim was explicitly dismissed "without prejudice" in *Kale I*. His attempt to distinguish *Shaver* on this basis is unpersuasive. With the exception of not incanting the magic words "without prejudice," in both cases, pendent state claims were dismissed for lack of jurisdiction. Dismissals for lack of jurisdiction are not "on the merits." *See* Fed. R. Civ. P. 41(b). *See also Hughes v. United States*, 4 Wall. (71 U.S.) 232, 237 (1866). *Cf. Rose*, 778 F.2d at 79.

Appendix.

V.

For the reasons stated above, defendant's Motion To Dismiss Or, In The Alternative, Motion For Entry Of Summary Judgment is hereby ALLOWED.

An order will issue.

Appendix.

United States District Court
District of Massachusetts

Carl Kale, Plaintiff,	*	
v.	*	CA No. 89-1640-T
Combined Insurance Company of America, Defendant	*	

ORDER
May 1, 1990

TAURO, D.J.

For the reasons stated in the accompanying Memorandum, defendant's Motion To Dismiss Or, In The Alternative, Motion For Entry Of Summary Judgment is hereby ALLOWED.

It is so ordered.

J. L. Tauro
United States District Judge

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE Plaintiff	*	CIVIL ACTION NO. 85-1840-S
v.	*	
COMBINED INSURANCE COMPANY OF AMERICA, Defendant	*	

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

September 26, 1986

SKINNER, D.J.

Plaintiff brought an action alleging in Count I of the complaint that his employment by the defendant had been terminated in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* He also brought pendent common law claims. Count II of his complaint alleging intentional infliction of emotional distress has already been voluntarily dismissed by order dated October 8, 1985. Count III alleged a breach of a covenant of good faith and fair dealing. Defendant now moves for summary judgment on Counts I and III.

Defendant claims that uncontroverted material facts demonstrate both that plaintiff's ADEA claim is time-barred and that it fails on the merits. Because I agree that plaintiff's claim is time-barred, I do not reach the merits.

Plaintiff was notified on May 11, 1983 that he was being terminated as of that day. He filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") on May 3, 1984, 357 days later.

The ADEA states that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed — . . . (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, . . .

29 U.S.C. 626(d).

Therefore, the express language of the ADEA seems to bar his claim.

It is true that the requirements of § 626 are not jurisdictional requirements. Rather, they are more in the nature of statutes of limitations and may be equitably modified. *Naton v. Bank of California*, 649 F.2d 691, 695-96 (9th Cir. 1981). Equitable tolling of the limitations period may be appropriate if the plaintiff was "excusabl[y] ignorant" of the filing requirement. *Id.*, at 696.

Appendix.

Plaintiff here was not excusably ignorant of the filing period. Section 627 of the ADEA requires that all employers post notices prepared by the Equal Employment Opportunities Commission "to effectuate the purposes of this chapter." 42 U.S.C. § 627. Defendant has submitted an uncontradicted affidavit stating that it had posted all the required notices. Several courts have found that such notices give potential plaintiffs constructive notice of their rights under the ADEA and what they must do to preserve those rights. "If notice is properly posted and the employee does not see it or sees it but is still not aware of his rights, there will normally be no tolling of the filing period." *McClinton v. Alabama By-Products Corporation*, 743 F.2d 1483, 1486 (11th Cir. 1985). *See also, Byers v. Follmer Trucking Company*, 763 F.2d 599 (3d Cir. 1985); *Vaught v. R.R. Donnelley & Sons Company*, 745 F.2d 407 (7th Cir. 1984). Nor has plaintiff suggested any other reason for his delay in filing his charge of discrimination with MCAD, such as any conduct by defendant which might have misled him into thinking that he had no claim. *See, e.g., Dillman v. Combustion Engineering*, 39 FEP Cases 1750 (2d Cir. 1986).

A plaintiff who fails to comply with the filing requirements must, at the very least, put forward an adequate explanation for his failure to comply. This plaintiff has failed to do so, and his claim is therefore time-barred.

Since I have disposed of plaintiff's lone federal claim, I now dismiss without prejudice Count III of his claim which alleges a state cause of action over

which there was only pendent jurisdiction. The exercise of pendent jurisdiction is discretionary. "[C]ertainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Walter Jay Skinner
United States District Judge

Appendix.

United States Court of Appeals
For the First Circuit

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee

[924 F.2d 1169]

Before
BREYER, *Chief Judge*,
COFFIN, *Senior Circuit Judge*,
and SELYA, *Circuit Judge*.

ORDER OF COURT

Entered: February 26, 1991

The petition for rehearing en banc filed by plaintiff-appellant Carl Kale is, under this court's internal operating procedures, considered both by the panel and by the full court. Panel rehearing is hereby *denied* for the following reasons.

Appellant's argument that his second action should survive because his pendent state-law claim in the first action was dismissed "without preju-

dice" was adequately answered in the panel opinion at pp. 12-13. Appellant's claim that the *res judicata* effect of that language was broader than the panel indicated overlooks that appellee, having won, could not appeal the "without prejudice" dismissal and thus could not be bound by that characterization to the extent urged by appellant. *See In re Public-Serv. Co.*, 898 F.2d 1, 2 (1st Cir. 1990) ("a party cannot appeal a judgment entered in its own favor"); *Bath Iron Works Corp. v. Coulombe*, 888 F. 2d 179, 180 (1st Cir. 1999) (similar); see also *Sierra Club v. Marsh*, 907 P.2d 2100 213 (1st Cir. 1990) ("appellant, having prevailed, could not have appealed [the order]").

Insofar as appellant urges, for the first time, new theories, variously characterized in his petition as "waiver," "acquiescence" and "estoppel by judgment," based on the fact that the defendant knew all along that the plaintiff could have asserted diversity jurisdiction, the contentions are not properly before us. The appellant did not make the contentions below. He did not make them in his appellate briefs. He did not make them at oral argument. He did not request leave, after oral argument, to file a supplemental brief. The points are, therefore, foreclosed. "[A] party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir. 1990) (opinion denying rehearing).

The petition for panel rehearing is *denied.*

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee.

BEFORE
Breyer, *Chief Judge*,
Campbell, Torruella, Selya, and *Cyr, Circuit Judges.*

ORDER OF COURT
Entered: February 26, 1991

The panel of judges that rendered decision in this case having denied the petition for rehearing and no judge who was a member of the panel nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc.

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:
Francis P. Scigliano
Clerk.

[cc: Messrs. Olenick and Bello]

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE,	)	
Plaintiff	)	
v.	)	Civil Action
COMBINED INSURANCE	)	No.85-1840-S
COMPANY OF AMERICA,	)	
Defendant	)	

MOTION FOR RECONSIDERATION, VACATION OF DISMISSAL, OR REMAND TO STATE COURT

Now comes the plaintiff and moves that this honorable Court reconsider its May 1, 1990 grant of the defendant's Motion to Dismiss Or, In The Alternative, Motion for Summary Judgment.

As grounds for this motion, the plaintiff submits the following:

Table of Contents

I. To treat a dismissal which was expressly "without prejudice" as being with prejudice violates both the letter and the purpose of the rules of *res judicata* 2

A. The rules of *res judicata* clearly exclude from their scope claims that were expressly dismissed "without prejudice" in the prior action 2

B. If this Court is to follow *Shaver* in expanding the rules of *res judicata*, it would be an abuse of discretion to do so retroactively, precluding claims that had been expressly preserved 4

Denied, J Tauro, DJ 7/16/90 **DOCKETED**

Appendix.

I. To treat a dismissal which was expressly "without prejudice" as being with prejudice violates both the letter and the purpose of the rules of *res judicata*.

Justice Skinner's prior dismissal of the plaintiff's state law claims was expressly without prejudice. To rule — as this Court just has — that the plaintiff's state law claims should nonetheless be treated as being completely barred on the basis of *res judicata*, turns that doctrine on its head, violating both its letter and its purpose.

A. The rules of *res judicata* clearly exclude from their scope claims that were expressly dismissed "without prejudice" in the prior action.

The plaintiff has no quarrel with authorities that say that all related claims must be asserted in one's first lawsuit or lost. However, to treat a claim as not asserted — when it *was* asserted but dismissed without prejudice — because only one of two bases for federal court jurisdiction was pled, is to treat the jurisdictional basis as part of the substantive claim.

It is "black letter law" that substance and procedure are separate. Were this not so, diversity actions would have to be tried in federal court under the rules of procedure of the state whose law created the claim.

Justice Skinner consciously chose to use the words "without prejudice" knowing that they are (as this court has derisively chosen to call them) "magic words" — as are all words of art that have been established as standard dispositions. They have a specific effect which may not be disregarded.

This Court relied, in its Memorandum, on the *Restatement of Judgments (Second)*, specifically § 24, for the general rule of claim preclusion. Again, the plaintiff has no disagreement with this general rule, but points out that § 26 of the *Restatement (Second)* recognizes clear exceptions to such claim preclusion. Indeed, this Court's Memorandum noted (at p. 9) the existence of § 26(f), dealing with discretionary exceptions to preclusion. It is hard to see how this court could have read § 26(f) without having noticed § 26(b)'s exception for when:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

Dismissal "without prejudice" is, of course, the classic way to reserve a plaintiff's right to maintain an action again.

No binding authority has been cited for ignoring this clear expression of the common understanding of the effect of dismissing a case without prejudice.

The Memorandum's citation of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981) is totally inapplicable, as (1) that case dealt with claims that had been entirely omitted from Brown's first action and (2) the initial Brown and Moitie actions had been dismissed "in their entirety" (452 U.S. at 396, 69 L.Ed.2d at 107).[1]

---

[1]Although decided under the name of *Moitie*, it was the facts of *Brown* that were the basis for the decision, as

(continued...)

Thus, under the letter of the traditional rules of *res judicata*, the plaintiff's state law claims are not precluded.

B. If this Court is to follow *Shaver* in expanding the rules of *res judicata*, it would be an abuse of discretion to do so retroactively, precluding claims that had been expressly preserved.

The plaintiff has pointed out the total lack of deference that has been shown to the Memorandum's persuasive authority, *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 109 S.Ct. 145 (#88-225, October 3, 1988), a two-to-one decision of three-member panel of the Seventh Circuit, which has been followed on this point by no other case (not even in the Seventh Circuit) — until this one.

To adopt the rule announced in *Shaver* would have the undesirable effect of forcing plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims. As a matter of judicial economy, this runs counter to the general effort to minimize the use of diversity jurisdiction.

However, if this Court chooses to do follow *Shaver*, it may not do so retroactively. It may not deprive this plaintiff of his day in court where that day in

---

[1](...continued)
Moltie was voluntarily dismissed before decision (see footnote 1 on the page of the opinion just cited).

court was expressly reserved to him by Justice Skinner.

It may not ambush the plaintiff by applying the unprecedented March 2, 1988 *Shaver* decision to a case that was filed in 1985 and dismissed in 1986. Had the plaintiff any inkling that such a case was on the horizon, diversity jurisdiction would have been asserted along with pendent jurisdiction. The Memorandum argues that nothing prevented the plaintiff from doing so. However, until now, nothing indicated that it would be necessary to do so. Indeed, the oft-expressed preference of federal courts that purely state law cases should be tried in state courts indicated that it would, in fact, be undesirable to do so, being preferable to go to state court with the case if appeal of the dismissal of the federal claim was unsuccessful.

As the general sentiment in the federal courts has been one of hostility to the use of diversity jurisdiction, it is hard to understand why a rule should be adopted here to *require* its assertion, rather than to allow a case to be taken back to the state courts after the federal claim involved is dismissed.

If any reason is needed to invoke the "occasional exception" to preclusion this Court recognizes can be allowed (*Memorandum* at page 9), this is one reason — unfair surprise. The most basic is that the root purpose behind the rules of *res judicata* is to protect the parties' right to clarity and certainty of result.

To retroactively expand the doctrine of *res judicata* to convert a dismissal without prejudice into a dismissal with prejudice is to appropriate the doct-

rine's name to oppose both its traditional rules and its root purpose.

The plaintiff went to state court with this action because it was clear that an argument could be made that he had waived diversity jurisdiction by not asserting it the first time.

If the defendant had been desirous of an adjudication on the merits on the state claims in the first action, the defendant should have asked Justice Skinner to retain the state claims under pendent jurisdiction or suggested to him the applicability of diversity jurisdiction. It could therefore even be held that the defendant has waived the use of diversity jurisdiction, barring this removal, and requiring a remand to state court. However, such a waiver-based remand would be of questionable validity. The best course is to retain jurisdiction here and allow this case to proceed to trial.

If the rules of compulsory joinder are to be extended to jurisdictional bases as well as claims, it should be done only prospectively. Such a change in the law *may not* be put into effect retroactively. As can be seen here, the effect of such retroactive application is impermissibly harsh and unpredictable, as it robs Justice Skinner's disposition of its intended effect and deprives Carl Kale of his day in court.

To change the rules retroactively, on the thinnest of precedent, while pretending that no change has been made, to foreclose a case that was expressly held open, is the grossest abuse of discretion.

Conclusion

This Court should reconsider the defendant's motion and vacate its dismissal of this case.

Appendix.

Respectfully submitted,

CARL KALE

By his attorneys,

Philip R. Olenick
Paul L. Nevins
BBO# 369330
Philip R. Olenick
BBO# 378605
40 Court Street-Suite 926
Boston, Mass. 02108
(617) 227-2889 / 720-4100

May 11, 1990

Certificate of Service

The undersigned hereby certifies that on May 11, 1990, he served a true copy of the foregoing by causing it to be deposited in the United States Mail, 1st class postage prepaid, addressed to:

Kenneth M. Bello, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

Philip R. Olenick
Philip R. Olenick

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE	)	
Plaintiff	)	
v.	)	Civil Action
COMBINED INSURANCE	)	No.85-1840-S
COMPANY OF AMERICA,	)	
Defendant	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Plaintiff Carl Kale hereby opposes the motion of defendant Combined Insurance Company of America (Combined) to dismiss the Complaint or, in the alternative, for summary judgment.

Combined makes two basic arguments:

First, that District Judge Skinner's prior explicit dismissal "without prejudice" of the plaintiff's pendent state law contract claim upon the dismissal (as late-filed) of his federal Age Discrimination in Employment Act (ADEA) claim should actually have been a *with* prejudice dismissal of all claims, due to the availability of an alternative basis for jurisdiction which had not been asserted (although Combined did not contest this ruling at the time); and

Second, that the plaintiff's Count VI, for negligent breach of implied covenant of good faith and fair dealing and of specific contractual rights, fails to state a claim and, being a tort claim, is time-barred.

These arguments will be addressed separately.

The With Prejudice "Without Prejudice" Dismissal

In support of its motion, Combined has submitted, as Exhibit B to the Affidavit of Kenneth M. Bello, Esquire, a copy of District Judge Skinner's **Memorandum and Order**, which granted the defendant's motion for summary judgment with respect to the plaintiff's federal ADEA claim, and expressly dismissed the state law contract claim "without prejudice" (Memorandum and Order, page 4) citing *United Mine Workers v. Gibbs*, 383 U. S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966).

U.M.W. v. Gibbs had held, of course, that:

> Certainly, if the federal claims are dismissed without trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.

383 U.S. at 726-727, 16 L.Ed.2d at 228, 86 S.Ct. at 1139. Although it cites numerous cases for the general rules of *res judicata*, Combined relies primarily on two cases, *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978) and *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 109 S.Ct. 145 (#88-225, October 3, 1988).

Cemer involved a plaintiff who initially brought only a federal claim, and, after that claim had been dismissed, later filed a state court action on a state claim. After removal to federal court on the basis of diversity of citizenship, the state law claim was dismissed as *res judicata*, on the basis of traditional

rules of compulsory joinder of claims, as it had been omitted from the first action. The Sixth Circuit brushed aside the plaintiff's argument that the original dismissal should have been on the basis of lack of jurisdiction rather than on statute of limitations grounds (a distinction which would have denied *res judicata* effect to the original dismissal) by saying that the plaintiff had waived any such objection by not raising it in a direct appeal from the dismissal.

Combined relies on *Cemer* for its observation that since diversity jurisdiction had existed to support joinder of the state law claim, there was no excuse for having omitted the claim, as might have existed if the only basis for joining it had been the discretionary exercise of pendent jurisdiction.

But *Cemer* dealt with an omitted claim in a closed case, and as such it has no application where the claim objected to was not omitted at all, and the case was dismissed "without prejudice."

Combined's trump case is *Shaver*, in which two judges from the Seventh Circuit held that failure to have asserted diversity jurisdiction in the first action rendered the dismissal of pendent claims upon summary judgment on the federal claim *res judicata*. A bitter dissent, after noting that the others had reached out to decide this issue although the District Court had granted summary judgment on the merits to the defendant without reaching this issue, pointed out that there was no authority for requiring the mandatory invocation of diversity jurisdiction rather than trying the remaining state claim in state court, citing *U.M.W. v. Gibbs*.

While the majority in *Shaver* tried to depict their holding as being based on "fundamental and substantial justice" (840 F.2d at 1368), the arbitrary impact of their rule cannot be ignored: had diversity in the original action been precluded by the joinder of a managerial employee as a co-defendant, the rule the *Shaver* majority perceived would not have protected the employer. What aspect of "fundamental and substantial justice" is implicated by allowing a defendant to benefit by the fortuity of whether or not another defendant had also been joined in an action that has long ago been dismissed?

Plaintiff's counsel has not been able to locate any other case that has followed *Shaver* in invoking, in effect, "compulsory joinder of alternative jurisdictional bases."[2] Counsel's Lexis search, which found cases as recent as Friday, August 18, found merely a small number of cases which have cited *Shaver* for the unexceptionable holding that *claims* arising out of a common nucleus of operative facts, including

---

[2]It was the defendant, not the plaintiff, that asserted diversity jurisdiction and brought this case here, after the plaintiff filed in Middlesex Superior Court. Despite Combined's argument on pages 2 and 4 of its Memorandum that the plaintiff should have sought to amend his complaint after the dismissal to assert diversity jurisdiction, there can be no doubt that such an amendment would have been opposed by Combined on the basis that the plaintiff's effort to claim diversity jurisdiction had been waived by not having been asserted initially.

terminations of employment, must be joined or lost, for which it is hardly a ground-breaking authority.

Whether or not the First Circuit would adopt the *Shaver* panel's innovative expansion of *res judicata* (which plaintiff's attorneys doubt), it is not open to Combined to argue it here, given its waiver of this issue at the time of the dismissal:

The plaintiff appealed from District Judge Skinner's grant of summary judgment on the federal claim in the *Memorandum and Order* submitted to this Court as an exhibit to Mr. Bello's affidavit.

Combined appealed District Judge Skinner's separate denial of sanctions to it against the plaintiff and its counsel.

Neither appeal succeeded, though the plaintiff's appeal did elicit the first opinion in this Circuit expressly holding that equitable tolling is available in ADEA cases.

Combined never challenged — nor did it cross-appeal from — District Judge Skinner's explicit ruling, in the order the plaintiff appealed from, that the dismissal was to be "without prejudice."

Just as the plaintiff in *Cemer* was held to have waived any disagreement he may have had about the basis or effect of the dismissal of his claim by failing to take a direct appeal of the basis for that dismissal, Combined's failure to appeal that ruling must be treated as a waiver of any disagreement it may have had with District Judge Skinner's dismissal of the state claim as being "without prejudice."

This sort of waiver is quite common. The First Circuit used it in *Raxton Corporation v. Anania Associates, Inc.*, 668 F.2d 622, at 624 (1st Cir.

1982), as did the Second Circuit in *Fogel v. Chestnutt*, 668 F.2d 100, 108-09 (2nd Cir. 1981), *cert den* 459 U.S. 828 (1982), *reh den* 459 U.S. 1059 (1982). The D.C. Circuit expressly followed both of those cases in holding, in *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90, 1102-03 (D.C. Cir. 1984), *cert den* 469 U.S. 1181 (1985), that the District Court had properly refused to reopen issues omitted from a prior appeal.

As Combined did not appeal District Judge Skinner's dismissal of the state claim as being "without prejudice," it has waived any argument that the claim should not have survived.

As that state claim survived, that should allow the assertion with it of other state claims that a trial court would have the discretion to allow amendment into an action based on the original surviving claim. This leaves out only intentional infliction of emotional distress (which had been voluntarily dismissed) and claims which would be time-barred and as to which no relation-back or tolling would be applicable. (See below for to the application of these principles to the tort claim.)

In fact, under principles of notice pleading, the bulk of the plaintiff's Counts in this action are inherent in the broad wording of the original surviving claim, which was supportable under various theories that are here merely spelled out separately for clarity. (The defendant appears to understand the extent to which they are implicit in the original claim, though it calls them new theories.) Although Counts I and II, by seeking declaratory relief, seek only a subset of the relief sought by the original

surviving claim, they are ultimately based on the same legal theories.

The Claim of Negligent Breach of Implied Covenant of Good Faith and Fair Dealing

Combined argues, at the bottom of page 2 of its Memorandum, that "Massachusetts does not recognize a 'negligent' implied covenant of good faith and fair dealing." Of course, the plaintiff is not alleging the existence of a negligent *covenant* (whatever that is) but a negligent *breach*, so Combined's argument that Count VI should be dismissed for failure to state a claim appears to be based on a misreading of the Complaint.

Combined also states that Count VI, for negligent breach of implied covenant of good faith and fair dealing and of specific contractual rights, being a tort claim, is time-barred.

The original federal district court action was commenced in May of 1985, almost precisely two years after the plaintiff's discharge in May of 1983. This would have been within the three year limitations period for a tort.

Under Federal Rule 15(c), the plaintiff could have moved to amend his complaint to add this claim, with the amendment relating back to the date of the complaint. As this was so, the time clock on such a claim was effectively tolled by the filing of the complaint, as both the Massachusetts and Federal Rules 3 provide for commencement of an action simply by filing.

Had the plaintiff succeeded in his appeal of summary judgment, he could have amended his complaint to bring back in his state law claims, including

adding the tort claim, thus the clock had not yet resumed running, as any such amendment would still have related back.

The clock did not begin to run again on the tort claim until the First Circuit denied the plaintiff's appeal, in November of 1988, at which point it began to run with two years already elapsed. The plaintiff brought this new action in May of 1989, approximately six months after the First Circuit's denial of his appeal, with only about two and a half years run on the three year tort claim limitations period. (Similarly, as to the contract claims, only the same approximately two and a half years had run, so that, far from being re-filed on the last possible day, as implied by Combined in its Memorandum, the plaintiff actually still had more than half of the six year contract claim limitations period remaining.)

The Request for Summary Judgment

Combined's request for summary judgment if dismissal is not granted is not supported by any factual showing. The plaintiff's Complaint is at least verified under the pains and penalties of perjury, giving it the effect of an affidavit. If either party is entitled to summary judgment on this record, it is the plaintiff.

Appendix.

Respectfully submitted,

CARL KALE

By his attorneys,

Philip R. Olenick
Paul L. Nevins
BBO# 369330
Philip R. Olenick
BBO# 378605
40 Court Street-Suite 926
Boston, Mass. 02108
(617) 227-2889 / 720-4100

Certificate of Service

The undersigned hereby certifies that on August 25, 1989, he served a true copy of the foregoing by causing it to be deposited in the United States Mail, 1st class postage prepaid, addressed to:

Kenneth M. Bello, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

Philip R. Olenick
Philip R. Olenick

REPRINTED COPY

(2)

90-1848

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No. 90-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

PHILIP R. OLENICK
[Counsel of Record]
PAUL L. NEVINS
40 Court Street-Suite 926
Boston, MA 02108
(617) 720-4100
Attorneys for Petitioner

Questions Presented.

I. May a federal Court of Appeals undermine the federal doctrines of *res judicata* and estoppel by judgment by explicitly disregarding, as incorrect *dicta*, a prior federal court's express words of disposition?

II. May a federal Court of Appeals undermine federal rules of waiver and estoppel by allowing a party to collaterally attack, as incorrect *dicta*, a prior federal court's express words of disposition in a proceeding to which it was a party, where it had neither brought the asserted error to the attention of the first court nor appealed from the disposition it now wishes to avoid?

III. May a federal Court of Appeals rewrite the federal rules of compulsory joinder of claims, retroactively, by treating the omission of an alternative basis for jurisdiction over a claim in a prior action, which resulted in a dismissal without prejudice, as the preclusive *omission* of that claim?

List of All Parties.

Petitioner

1. Carl Kale

Respondent

2. Combined Insurance Company of America

Table of Contents.

Questions Presented i
List of All Parties ii
Table of Contents iii
Table of Authorities v
Citations to Opinions Below 1
Jurisdiction 2
Statement of the Case 2

Reasons for Granting the Writ 7

I. A Federal Court's Express Use of the Words "Without Prejudice" in Dismissing a Claim Is Binding, And May Not Be Ignored in Order to Treat That Dismissal As Precluding Further Suit 7

II. The Respondent's Failure to Either Advise District Judge Skinner of the Existence of Diversity Jurisdiction to Secure a Final Adjudication or to Appeal His Use of the Words "Without Prejudice" Should Bar It From Questioning That Disposition 14

III. A Claim That Was Joined Under Pendent Jurisdiction Is Not Transformed Into An "Omitted Claim" Simply Because A Second Basis For Jurisdiction Existed 17

Conclusion 22

Appendix

Decision of the First Circuit, January 25, 1991 ..... A-1
Memorandum by District Judge Tauro May 1, 1990 ..... A-18
Order of District Judge Tauro allowing motion of defendant to dismiss or for summary judgment, May 1, 1990 ..... A-32
District Judge Skinner's Memorandum and Order on Defendant's Motion for Summary Judgment, September 26, 1986 ..... A-33
Decision of the First Circuit denying rehearing, February 26, 1991 ... A-37
Order of the First Circuit denying rehearing *en banc*, February 26, 1991 ..... A-39
Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court, showing District Judge Tauro's denial of motion on face page A-40
Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment A-47

Table of Authorities.

CASES.

Allen v. McCurry, 449 U.S. 90 (1980) 11

Balcom v. Lynn Ladder and Scaffolding Co., Inc., 806 F.2d 1127 (1st Cir. 1986) 15

Bath Iron Works Corporation v. Coulombe, 888 F.2d 179 (1st Cir. 1989) 15

Brown v. Board of Education, 347 U.S. 483 (1954) 4

Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Risty, et al., 276 U.S. 567 (1928) 10

Cromwell v. County of Sac, 94 U.S. 351 (1877) . 11

Crop-Maker Soil Services, Inc. v. Fairmount State Bank, 881 F.2d 436 (7th Cir. 1989) 20

Davis-Gilbert v. Alberto-Culver Co., No. 90-2727, 1991 U.S. App. Lexis 6199, (7th. Cir., April 5, 1991) 20

Deposit Bank v. Frankfort, 191 U.S. 499 (1903) 11

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) 15

Fayerweather v. Ritch, 195 U.S. 276 (1904) ... 11

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 11, 18

Gray v. Lacke, et al.,885 F.2d 399 (7th Cir. 1989) 20

In re Public Service Co. of New Hampshire, 898 F.2d 1 (1st Cir. 1990) 15

Kempe's Lessee v. Kennedy, 5 Cranch (9 U.S.) 173 (1809) 11

Kotwitz v. Frank, 902 F.2d 37 (7th Cir. 1990) .. 20

La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900 (7th Cir. 1990) 20

Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc., 921 F.2d 732 (7th Cir. 1991) 20

Mursch v. Van Dorn Company, 851 F.2d 990 (1988) 20

Nevada v. U.S., 463 U.S. 110 (1983) 11

Plessy v. Ferguson, 163 U.S. 537 (1896) 4

Reed v. Allen, 286 U.S. 191 (1932) 11

Rosado v. Wyman, 397 U.S. 397 (1970) 9

Secon Service System, Inc. v. St. Joseph Bank and Trust Company, et al., 855 F.2d 406 (7th Cir. 1988) 20

Shaver v. F.W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988) 4, 5, 12, 18-21

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 3, 9, 19

RESTATEMENT (SECOND) OF JUDGMENTS.

§ 20(1)(b) 10
§ 24 10
§ 26(1)(a) 16, 17
§ 26(1)(b) 10, 16

No. 90-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals for the First Circuit entered in this proceeding on January 25, 1991 and February 26, 1991 (denying rehearing).

Citations to Opinions Below.

The opinions of the Court of Appeals in this proceeding, both original and denial of rehearing, re-

ported as *Carl Kale v. Combined Insurance Company of America*, are reported at 924 F.2d 1161 and 1169 (1st Cir. 1991), and appear in the Appendix hereto along with the separate judgment and orders of that court.

The opinion of District Judge Tauro of the United States District Court for the District of Massachusetts in this proceeding is reported at 736 F.Supp. 1183 (D.Mass. 1990) and appears in the Appendix hereto, along with the unreported prior decision of District Judge Skinner in the initial action, rendered September 26, 1986, along with District Judge Taruo's unreported order denying the petitioner's motion for reconsideration of his decision.

Jurisdiction.

The judgment and opinion of the Court of Appeals for the First Circuit were entered on January 25, 1991. A timely petition for rehearing was denied on February 26, 1991, and the opinion and order on that denial are, as indicated above, included in the Appendix hereto. This Petition for Certiorari is being filed on the first business day 90 days after the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Statement of the Case.

The petitioner was employed by the respondent in Massachusetts at Hearthstone Plaza until May 11, 1983. He had worked there since January 29, 1963, first as an employee of the respondent's wholly-

owned and directly-managed subsidiary and then as a direct employee of the respondent after the subsidiary was merged into the parent. He was fired with no prior notice, effective the same day.

The petitioner initially brought suit in the U.S. District Court for Massachusetts on both federal Age Discrimination and state law claims under Massachusetts law on May 8, 1985. Jurisdiction over the state law claims was asserted on the basis of pendent jurisdiction. The federal age discrimination claim was dismissed by District Judge Skinner in 1986 on the basis that the petitioner's administrative agency complaint had been untimely. District Judge Skinner then declined to exercise his discretion to retain the state law contract claim under pendent jurisdiction, and, citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), dismissed the state law contract claim "without prejudice."[1]

---

[1]*Memorandum and Order on Defendant's Motion for Summary Judgment*, A-33, at A-35 to A-36.

As noted in the opinion of the First Circuit here sought to be reviewed, A-1, at A-3, the petitioner appealed the dismissal of his federal ADEA claim in that action. That appeal sought to have the availability of equitable tolling extended to ADEA actions, which elicited an opinion recognizing such a possibility but denying it in that case. (Dismissal under *Gibbs* was not appealed, as it was a proper exercise of discretion.)

As noted in footnote 2 at A-3, the respondent sought sanctions for the petitioner's even having filed the action, and for taking that appeal. Sanctions were denied after

(continued...)

The current action was brought in Massachusetts' Middlesex Superior Court by the petitioner on May 10, 1989, asserting violation of express and implied promises to him, both written and oral, that he would not be discharged except for just cause. It was removed to the United States District Court for Massachusetts by the respondent, asserting diversity of citizenship, the amount in controversy exceeding the jurisdictional amount. Without answering, the respondent immediately moved to dismiss, or, in the alternative, for summary judgment, on the basis that District Judge Skinner's dismissal was *res judicata*.

The respondent's claim of *res judicata* was based on the argument that the petitioner's state law contract claim, although joined in the original action on the basis of pendent jurisdiction, could also have been supported by diversity jurisdiction, and that the petitioner's failure to plead diversity jurisdiction constituted "claim splitting," on the authority of *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988).

The petitioner pointed out to District Judge Tauro that the state contract claim had expressly been dismissed "without prejudice" by District Judge

---

[1](...continued)
the petitioner pointed out that on the respondent's theory, all those taking test cases should be sanctioned, including Thurgood Marshall, who challenged *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Skinner, explicit language absent from the dismissal leading to *Shaver* (a copy of which the respondent had submitted to District Judge Tauro). The petitioner argued that District Judge Skinner's use of the words "without prejudice" was binding on the respondent, as it had neither sought a conclusive adjudication of the state law claim under diversity jurisdiction nor appealed his use of the words "without prejudice."[2] The petitioner also argued that it would be incorrect and unfair to retroactively expand the rules of bar to use a 1988 case to transform a 1986 dismissal without prejudice into a preclusive dismissal with prejudice.

District Judge Tauro rejected the petitioner's reliance on the express "without prejudice" disposition of the state claim by asserting that they were unnecessary "magic words," as dismissals for lack of jurisdiction are always without prejudice.[3]

In his appeal brief to the First Circuit, the petitioner repeated the arguments he had made to District Judge Tauro.

At oral argument before a panel of the First Circuit, Chief Judge Breyer elicited from counsel for the respondent at oral argument before the panel the admission that the respondent knew of the existence

---

[2]See *Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment*, A-47, at A-51, and his *Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court*, A-40, at A-45.

[3]See *Memorandum* by District Judge Tauro, A-18 at A-30.

of diversity jurisdiction but chose not to tell District Judge Skinner in the prior action as it did not consider it to be its responsibility to do so, and suggested to respondent's counsel that the respondent should be estopped from asserting this defense by its prior silence on the subject, including its failure to directly appeal the dismissal's being "without prejudice." Petitioner's counsel then offered to provide the First Circuit with copies of his memoranda before District Judge Tauro on this issue, which was declined as unnecessary.

The panel opinion, authored by Circuit Judge Selya, took no account of the admissions elicited at oral argument by Chief Judge Breyer, called the express words of disposition "supererogatory," and disregarded them as being based upon an incorrect and incomplete presentation of the facts.[4]

Having deprived District Judge Skinner's disposition of its normal preclusive effect against challenges to the correctness of the dismissal's being without prejudice, both District Judge Tauro and Circuit Judge Selya adopted the 1988 opinion of the Seventh Circuit which announced the expansion of the concept of "claim splitting" now relied upon by the respondents. They dismissed any protest that applying it retroactively to a 1986 dismissal in this case was unfair surprise, by saying that no exceptions would be made for those who had not followed the rules, even though those rules had never been

---

[4]Decision of the First Circuit, January 25, 1991, A-1, at A-13 to A-14.

announced by any court at the time of the prior action,[5] and despite Circuit Judge Selya's opening sentence trumpeting that this appeal presents an issue of "first impression in this circuit."[6]

On rehearing, the First Circuit denied that the use of the words "without prejudice" could bind the respondent, arguing that a prevailing party can never appeal, and asserted that the petitioner had waived any argument that the respondent had waived (or was estopped from advancing) the defense that the original dismissal was preclusive by never having presenting it before the petition for rehearing.

Reasons for Granting the Writ.

I. A FEDERAL COURT'S EXPRESS USE OF THE WORDS "WITHOUT PREJUDICE" IN DISMISSING A CLAIM IS BINDING, AND MAY NOT BE IGNORED IN ORDER TO TREAT THAT DISMISSAL AS PRECLUDING FURTHER SUIT.

The doctrines of *res judicata* and collateral estoppel, as laid down by decisions of this Court, hold that a court's explicit disposition of a claim, entered with jurisdiction after full opportunity to be heard and never appealed, may not be denied binding effect. Waiver and estoppel prevent a party to the initial action from even arguing that the first court acted in ignorance of facts which that party could

---

[5] *Id.* at A-12, n. 5.

[6] *Id.* at A-2.

have presented in that action, but which it chose not to present until now.

District Judge Skinner's prior dismissal of the Carl Kale's state law contract claim was expressly "without prejudice."

This disposition was made with jurisdiction to make it, after Combined Insurance (which has now admitted to Chief Judge Breyer that it knew perfectly well at the time that diversity jurisdiction existed, but had chosen not to tell Judge Skinner so) had been fully heard, and it was not appealed by Combined.

Under traditional, *and binding*, principles of *res judicata* and collateral estoppel, that disposition is insulated from review as to its correctness by decisions of this Court, as is argued below.

Justice Skinner consciously chose to use the words "without prejudice" knowing that they are (as District Judge Tauro derisively chose to call them) "magic words"[7] — as are all words of art that have been established as standard dispositions. They have a specific intended effect which may not be disregarded.

To do so, District Judge Tauro argued that they had no effect as they were part of a dismissal on the basis of lack of jurisdiction. This stands all expectations regarding finality on their head, holding that a final judgment can be found because there was no jurisdiction to say that the judgment was not final.

---

[7]At A-30.

It also ignores that there *was* jurisdiction, and that District Judge Skinner had simply chosen not to exercise it. As the Supreme Court said, in *UMW v. Gibbs*,

> Certainly, if the federal claims are dismissed without trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.[8]

If state claims "should" be dismissed, that means that this is the exercise of discretion, and that jurisdiction to retain them does exist.

Gibbs sets out guidelines for the exercise of discretion by the federal courts in exercising their jurisdiction, but it has been widely recognized as allowing federal courts to retain jurisdiction over pendent claims even after the federal claims that brought them to federal court are gone.[9]

Thus, the dismissal "without prejudice" was entered with full jurisdiction to do so, and itself should

---

[8]383 U.S. at 726-727.

[9]*See Rosado v. Wyman*, 397 U.S. 397, 403-403 (1970), which approved a district court's retaining jurisdiction of a pendent claim after dismissal of the federal claim. *See also* cases collected at fn. 20 to Jurisdiction § 3567.1, Volume 13B, *Federal Practice and Procedure*, Wright, Miller, Cooper (1984).

be accorded *res judicata* effect, barring the respondent's motion here.

Once District Judge Skinner's disposition is recognized as binding, reversal of District Judge Tauro's dismissal was required. Once the claim's dismissal's being "without prejudice" was established, it is outside *res judicata's* bar of claim splitting.

Both District Judge Tauro and Circuit Judge Selya quoted the *Restatement of Judgments (Second)*, specifically § 24, for the general rule of claim preclusion. The petitioner merely points to § 26(1)(b) of the *Restatement (Second)* which recognizes a clear exception to claim preclusion where:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

Dismissal "without prejudice" is, of course, the classic way to reserve a plaintiff's right to maintain an action again.[10]

(This is made equally clear by § 20(1)(b), to the same effect, which excludes from the rule of bar cases dismissed "without prejudice.")

District Judge Tauro and Circuit Judge Selya essay to avoid this result by denying District Judge Skinner's order that the state claim be dismissed "without prejudice" *res judicata* effect on the basis

---

[10]*Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Risty, et al.*, 276 U.S. 567 (1928) (dismissal "without prejudice" prevents assertion of *res judicata*).

that District Judge Skinner had incomplete information. This cannot be sustained.

This Court's decisions make it clear that between the original parties — which this petitioner and respondent are — a decision is binding, and cannot be upset on the basis that it was wrong or based on incomplete information.[11]

The only limitations are that such binding effect may be denied if the original decision was void as entered without jurisdiction, or was entered in violation of a party's due process right to be heard, or if the original decision has since been reversed upon appeal.

None of these limitations apply here.

If the federal court had jurisdiction to retain the case if it found it appropriate, then a decision to dismiss in such circumstances could be made either

---

[11] *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (incorrectness of prior decision does not rob it of *res judicata* effect); *Deposit Bank v. Frankfort*, 191 U.S. 499, 510, 514 (1903) (reasons for decision not open to inquiry, even if decision would not be the same on a fresh inquiry); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (purpose of doctrines of *res judicata and collateral estoppel* is to encourage reliance upon decisions); to same effect *see Reed v. Allen*, 286 U.S. 191, 198-201 (1932), *Kempe's Lessee v. Kennedy*, 5 Cranch (9 U.S.) 173, 186 (1809); *Nevada v. U.S.*, 463 U.S. 110, 128-130 (1983); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877) and *Fayerweather v. Ritch*, 195 U.S. 276 (1904).

with or without prejudice.[12] In fact, as such a dismissal would be on the basis of the exercise of discretion, and not on the basis of lack of jurisdiction, it cannot be assumed to be without prejudice unless clearly stated as such. Thus, the use of the words "without prejudice" is necessary to prevent the dismissal from being preclusive. (Circuit Judge Selya's decision thus goes beyond the Seventh Circuit decision in *Shaver*, which had no explicit reservation of the petitioner's right to sue again to disregard.)

Carl Kale's assertion that District Judge Skinner's dismissal of his state law claim "without prejudice" preserved his right to sue again elicited responses from District Judge Tauro and Circuit Judge Selya that disregarded it as non-binding *dicta*, though they both shied away from using that word, and stretched to find other words to label the express words of disposition unnecessary.

This was a major innovation, seriously limiting the reach of *res judicata*. The irreducible minimum of any decision is its disposition. If *that* can be treated as non-binding dicta, then no part of any decision is safe from this angle of attack.

The reasoning used in this case by Circuit Judge Selya creates a precedent for undermining every decision of every court everywhere. Despite his modest effort to portray it as a straightforward interpretation of *res judicata*, it is much broader than

---

[12]See fn. 22, to the work cited in n. 9 *supra*, arguing that such dismissals *should* make explicit whether they are intended to be with or without prejudice.

just the specific facts here, and puts him in the forefront of a major effort at law reform.

The broad impact of his decision can be seen once it is recognized that in every case there is *some* fact introduced by neither side. It is unlikely that if one side omits a key fact for its case that the other side would rush to introduce it.

If District Judge Skinner's use of the words "without prejudice" can be disregarded as *dicta*, then any plaintiff whose case was dismissed "with prejudice" due to a failure of his proof could come back later, after brooding over his case, and say that since there were facts that were not presented that would have led to a different result, the disposition should be not be considered binding, since all dismissals for insufficient proof are automatically with prejudice, making the use of those words "supererogatory."[13]

He would argue that, due to the defendant's failure to present the information that would have enabled the first court to fully adjudge whether or not his case really was worthless, the phrase "with prejudice" "could not have constituted an express [finding of no liability] since [the defendant] had withheld the very information which would have made such a [disposition] meaningful."[14]

He would, of course, quote Circuit Judge Selya's opinion, suggesting that what's sauce for the goose is

---

[13]Decision of the First Circuit, January 25, 1991, A-1, at A-13 to A-14.

[14]A-14.

sauce for the gander. Circuit Judge Selya's opinion thus sanctions such an effort by every disappointed litigant who concludes that direct appeal would be unavailing, as the first court had made no reversible error, but a second chance at a trier of fact, with better evidence, would do the trick.

To make a decision's finality depend on its correctness or the completeness of the information placed before the first court means that an assertion of *res judicata* adds nothing in any case. It amounts to an attempt to completely repeal the doctrine. (One of course assumes that it is made in a "good faith effort to extend, modify, or reverse existing law.")

II. THE RESPONDENT'S FAILURE TO EITHER ADVISE DISTRICT JUDGE SKINNER OF THE EXISTENCE OF DIVERSITY JURISDICTION TO SECURE A FINAL ADJUDICATION OR TO APPEAL HIS USE OF THE WORDS "WITHOUT PREJUDICE" SHOULD BAR IT FROM QUESTIONING THAT DISPOSITION.

It is hard to see why Circuit Judge Selya even reached the question of whether District Judge Skinner's incomplete information made his disposition meaningless, much less went out on a limb with his opinion, given Chief Judge Breyer's extraction from the respondent at oral argument of admissions that should be taken to have estopped it from raising this issue on the basis of estoppel by judgment and by its waiver of this issue previously.

It doesn't take much thought to figure out why the respondent didn't tell District Judge Skinner that

diversity jurisdiction existed — it would have resulted in the claim remaining open before him. But why didn't it bring it up in the first set of appeals, from District Judge Skinner's action, and argue there what it is arguing here?

The respondent's reply to Chief Judge Breyer when he asked that question at oral argument before the panel — that it didn't appeal because a prevailing party can't appeal a dismissal without prejudice — is not convincing.

First of all, it was wrong.[15]

---

[15] As Chief Judge Breyer correctly responded, "I've read my opinions, and they don't apply."

In re Public Service Co. of New Hampshire, 898 F.2d 1 (1st Cir. 1990), does contain broad dicta to the effect that a prevailing party can never appeal. However, appeal by a prevailing party of a final order that *could* have undesired collateral effects is not prevented either by the very different facts of that case — which refused to allow the appeal of the denial of a motion for leave for an interlocutory appeal, without prejudice to the later filing of a motion to enter final judgment to permit an appeal — nor by the explicit reasoning of the cases it relied upon directly, *Bath Iron Works Corporation v. Coulombe*, 888 F.2d 179 (1st Cir. 1989), and indirectly, *Balcom v. Lynn Ladder and Scaffolding Co., Inc.*, 806 F.2d 1127 (1st Cir. 1986) and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).

In fact, *Deposit Guaranty* allowed the prevailing party to appeal on just that basis. The existence of the instant case is a clear collateral effect of the dismissal "without

(continued...)

Secondly, another reason is much more plausible: like the petitioner, the respondent never anticipated the rule of preclusion it now argues he should have seen coming, something the respondent can't admit — because to do so would undercut application of that rule to the petitioner's case.

The respondent's failure to inform District Judge Skinner of the existence of diversity jurisdiction, in order to secure a final decision of all claims in the first proceeding, or to appeal his use of the words "without prejudice" directly, should estop it from collaterally attacking that dismissal's being without prejudice. That issue was expressly decided, even if on incomplete information, and should estop it on the basis of simple waiver.

Even if a court chooses to interpret the doctrine of *res judicata* so narrowly to ignore the explicit dismissal of the state claim "without prejudice," it may not then interpret that doctrine so broadly as to deny its normal exclusions from the rules of claim splitting.

The *Restatement of Judgments (Second)*, from which both District Judge Tauro and Circuit Judge Selya quoted the general rule against claim splitting, provides, as exceptions to the rule of bar not only § 26(1)(b) and § 20(b) just discussed, but also § 26(1)(a) for when:

---

[15](...continued)
prejudice" as a with prejudice dismissal would not have allowed a new suit to be filed.

(a) The parties have agreed in terms or effect that the plaintiff may split his claim, or the defendant has acquiesced therein;

It was admitted by the respondent at oral argument before the panel that it knew of the existence of diversity jurisdiction while the case was before District Judge Skinner. Thus, its failure to object to the dismissal without prejudice was a tacit acquiescence to this splitting of the petitioner's claims.

As noted in the Statement of the Case above, this cluster of issues was squarely before both District Judge Tauro and the First Circuit panel that decided the case, and cannot be disregarded on any argument that the petitioner has somehow waived it.

III. A Claim That Was Joined Under Pendent Jurisdiction Is Not Transformed Into An "Omitted Claim" Simply Because A Second Basis For Jurisdiction Existed.

The petitioner has no quarrel with authorities that say that all related claims must be asserted in one's first lawsuit or lost. However, to treat a claim as not asserted — when it *was* asserted but dismissed without prejudice — because only one of two bases for federal court jurisdiction was pled, is to treat the jurisdictional basis as part of the substantive claim.

It is "black letter law" that substance and procedure are separate. Were this not so, diversity actions would have to be tried in federal court under

the rules of procedure of the state whose law created the claim.

District Judge Tauro's and the First Circuit's uses of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) were totally incorrect, as (1) that case dealt with claims that had been entirely omitted from the first action and (2) the initial actions in that case had been dismissed "in their entirety" (452 U.S. at 396). (As noted above, *Moitie* actually supports the petitioner, as it stands for the proposition that a decision cannot be robbed of *res judicata* effect by saying it was wrong, which is what the First Circuit here did to District Judge Skinner's use of the words "without prejudice.")

Under the letter of the traditional rules of *res judicata*, the petitioner's state law claims are not precluded.

Both the First Circuit and District Judge Tauro rely, however, on the case of *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 488 U.S. 856 (1988), a two-to-one decision of three-member panel of the Seventh Circuit.

Shaver held, on a fact pattern similar to this one, that the failure of the plaintiff to have asserted diversity jurisdiction in addition to pendent jurisdiction over the state law claims filed in the federal action rendered the dismissal of the state law claims upon dismissal of the federal claim *res judicata*. *Shaver* held, as did the decisions here appealed from, that the duty to join all claims means that all possible jurisdictional bases must be joined, disregarding the distinction between rules of procedure and substantive claims. A bitter dissent in *Shaver* noted that the

other two Justices had reached out to decide this issue although the District Court had granted summary judgment on the merits to the defendant without reaching this issue, and pointed out that there was no authority for requiring the mandatory invocation of diversity jurisdiction rather than trying the remaining state claim in state court, citing *U.M.W. v. Gibbs*.

While the majority in *Shaver* tried to depict their holding as being based on "fundamental and substantial justice" (840 F.2d at 1368), the arbitrary impact of their rule cannot be ignored: Had diversity in *Shaver*'s (or Carl Kale's) original action been precluded by the joinder of a managerial employee as a co-defendant, the rule the *Shaver* majority perceived would not have protected the employer. What aspect of "fundamental and substantial justice" is implicated by allowing a defendant to benefit by the fortuity of whether or not another defendant had also beer joined in an action that has long ago been dismissed?

Shaver's majority should have been frank enough to admit making new law, since they relied for authority on Professor Wright's treatise, not on any source of law. Their result cannot be said to be compelled by any rule of "fundamental and substantial justice," but was itself a "fundamental" departure from tradition.

In an effort to find other courts' treatment of the Seventh Circuit decision in *Shaver*, petitioner's counsel has repeatedly shepardized and conducted Lexis searches on all federal and state court decisions for citations to *Shaver*, most recently this

week. These searches found cases as recent as April 5, 1991, including *Shaver* itself, the opinions here appealed from, eight decisions of the Seventh Circuit, and seventeen decisions of district courts within that circuit. Only one state court decision was found. No decisions of federal courts outside the Seventh Circuit were found, other the denial of certiorari in *Shaver* itself and the opinions here appealed from.

Further, other than the decisions here appealed from no court — even within the Seventh Circuit — has relied on (or even referred to) the Seventh Circuit's departure in *Shaver*.

All but one of the other courts cited *Shaver* for traditional aspects of *res judicata* discussed in the lead-in to its departure from tradition.[16] (The exception was a citation, in *Mursch v. Van Dorn Company*, 851 F.2d 990 (7th Cir. 1988), of the *Shaver* dissent's observation that an employee handbook could become an express contract.)

---

[16]*Davis-Gilbert v. Alberto-Culver Co.*, No. 90-2727, 1991 U.S. App. Lexis 6199, (7th. Cir., April 5, 1991); *Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc.*, 921 F.2d 732 (7th Cir. 1991); *La Preferida, Inc. v. Cervecería Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990); *Kotwitz v. Frank*, 902 F.2d 37 (7th Cir. 1990); *Gray v. Lacke, et al.*,885 F.2d 399 (7th Cir. 1989); *Crop-Maker Soil Services, Inc. v. Fairmount State Bank*, 881 F.2d 436 (7th Cir. 1989); and *Secon Service System, Inc. v. St. Joseph Bank and Trust Company, et al.*, 855 F.2d 406 (7th Cir. 1988).

Other than the opinions here appealed from, only Professor Wright has cited *Shaver* for the point in issue here (noting in his citation that *Shaver* had relied upon his treatise.)

To adopt the rule announced in *Shaver* would have the undesirable effect of *forcing* plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims. As a matter of judicial economy, this runs counter to the general effort to minimize the use of diversity jurisdiction.

However, if a Circuit does choose to adopt *Shaver*, it may not do so retroactively. It may not deprive this plaintiff of his day in court where that day in court was expressly reserved to him by Justice Skinner.

It may not ambush the plaintiff by applying the unprecedented March 2, 1988 *Shaver* decision to a case that was filed in 1985 and dismissed in 1986. Had the petitioner any inkling that such a case was on the horizon, diversity jurisdiction would have been asserted along with pendent jurisdiction. The courts below argue that nothing prevented the petitioner from doing so. However, until now, nothing indicated that it would be necessary to do so. Indeed, the oft-expressed preference of federal courts that purely state law cases should be tried in state courts indicated that it would, in fact, be undesirable to do so, being preferable to go to state court with the case if appeal of the dismissal of the federal claim was unsuccessful.

As the general sentiment in the federal courts has been one of hostility to the use of diversity jurisdic-

tion, it is hard to understand why a rule should be adopted to *require* its assertion, rather than to allow a case to be taken back to the state courts after the federal claim involved is dismissed.

The petitioner went to state court with this action because it was clear that an argument could be made that he had waived diversity jurisdiction by not asserting it in his first action. It is the respondent that has asserted diversity jurisdiction here, not the petitioner.

If the rules of compulsory joinder are to be extended to jurisdictional bases as well as claims, it should be done only prospectively. Such a change in the law *may not* be put into effect retroactively. As can be seen here, the effect of such retroactive application is impermissibly harsh and unpredictable, as it robs Justice Skinner's disposition of its intended effect and deprives the petitioner of his day in court.

To change the rules retroactively, on the thinnest of precedent, while pretending that no change has been made, to foreclose a case that was expressly held open, was the grossest abuse of discretion.

Conclusion.

If any reason is needed to invoke this Court's review in this case, the most basic is that the opinions here appealed from attack the root purpose behind the rules of *res judicata* — to protect the parties' right to clarity and certainty of result.

To first deny *res judicata* effect to a decision to dismiss without prejudice on the basis that it was in error, and then to retroactively expand the doctrine

of *res judicata* to convert that dismissal into a dismissal with prejudice is to appropriate the doctrine's name to oppose both its traditional rules and its root purpose.

PHILIP R. OLENICK
[Counsel of Record]
PAUL L. NEVINS
40 Court Street-Suite 926
Boston, MA 02108
(617) 720-4100
Attorneys for Petitioner

No. 90-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,

Petitioner,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appendix to Petition for Writ of Certiorari

PHILIP R. OLENICK
[Counsel of Record]
PAUL L. NEVINS
40 Court Street-Suite 926
Boston, MA 02108
(617) 720-4100
Attorneys for Petitioner

Appendix Table of Contents.

Decision of the First Circuit, January 25, 1991 ..... A-1
Memorandum by District Judge Tauro May 1, 1990 ..... A-18
Order of District Judge Tauro allowing motion of defendant to dismiss or for summary judgment, May 1, 1990 ..... A-32
District Judge Skinner's Memorandum and Order on Defendant's Motion for Summary Judgment, September 26, 1986 ..... A-33
Decision of the First Circuit denying rehearing, February 26, 1991 ... A-37
Order of the First Circuit denying rehearing *en banc*, February 26, 1991 ..... A-39
Motion for Reconsideration, Vacation of Dismissal, or Remand to State Court, showing District Judge Tauro's denial of motion on face page A-40
Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment A-47

Appendix.

United States Court of Appeals
For the First Circuit

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee

January 25, 1991

[924 F.2d 1161]

Appeal from the United States District Court for the District of Massachusetts
[HON. JOSEPH L. TAURO, *U.S. District Judge.*]

Before
BREYER, *Chief Judge,*
COFFIN, *Senior Circuit Judge,*
and SELYA, *Circuit Judge.*

Philip R. Olenick, with whom *Paul L. Nevins* was on brief, for appellant.

Kenneth M. Bello, with whom *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.* was on brief, for appellee.

Appendix.

SELYA, *Circuit Judge.* This appeal presents an issue of first impression in this circuit. Believing, as we do, that a straightforward application of the hoary doctrine of *res judicata* is dispositive of the question raised, we affirm the district court's dismissal of plaintiff's civil action.

I. BACKGROUND

At all times material hereto, plaintiff-appellant Carl Kale has been a citizen and resident of Massachusetts. He was formerly employed by defendant-appellee Combined Insurance Company of America (Coinco), a "citizen" of Illinois. See 28 U.S.C. § 1332(c) (specifying method of determining corporation's citizenship for purposes of diversity jurisdiction). In May 1983, after some two decades with Coinco and its predecessor in interest, appellant was cashiered.

Seeking vindication, Kale filed suit in the United States District Court for the District of Massachusetts. He pled federal question jurisdiction, 28 U.S.C. § 1331, and alleged that his firing violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. He adorned his ADEA complaint with pendent state-law claims for intentional infliction of emotional distress and breach of an implied covenant of good faith and fair dealing (predicated upon Coinco's alleged failure to abide by promises made in its personnel manual). The case was assigned to Judge Skinner. The state-law claim for intentional infliction of emotional distress was voluntarily discontinued at a relatively early date. Later

on, Judge Skinner granted summary judgment, finding the federal statutory claim to be time-barred.

Inasmuch as Kale's complaint to all intents and purposes asserted only federal question jurisdiction,[1] rejection of the ADEA count seemingly ended the federal court's interest in the matter; at any rate, Judge Skinner dismissed the appended state-law claim at that juncture, writing: "Since I have disposed of plaintiff's lone federal claim, I now dismiss without prejudice [the remaining] state cause of action over which there was only pendent jurisdiction." Appellant — who does not dispute that he knew at the time that diversity of citizenship existed — did not alert the court to, or make any effort to assert the presence of, diversity jurisdiction, 28 U.S.C. § 1332(a). By the same token, he neither sought reconsideration of, nor appealed, the dismissal of his state-law claim. He did appeal the entry of summary judgment on the ADEA claim. He lost. *See Kale v. Combined Ins. Co.*, 861 F.2d 746, 750-56 (1st Cir. 1988). That ended the original action (which we will henceforth refer to as "*Kale I*").[2]

---

[1]The appellant did mention 28 U.S.C. § 1332 in a string citation in his original complaint. See *Kale v. Combined Ins. Co.*, 736 F. Supp. 1183, 1184 n.3 (D. Mass. 1990) (describing original complaint). But, this cursory reference was totally inadequate to put the district court on inquiry notice.

[2]In the appeal, we also dealt with Coinco's request that the plaintiff be sanctioned. *See Kale I*, 861 F.2d at

(continued...)

The waters did not remain placid for long. In May 1989, Kale filed a new suit in a Massachusetts state court, alleging a tsunami of state-law claims, e.g., breach of contract (based on the personnel manual), promissory estoppel, tortious breach of the implied good faith/fair dealing covenant. Diversity jurisdiction being apparent from the face of the record, Coinco removed the case to the federal district court. *See* 28 U.S.C. §§ 1332(a), 1441. It then moved to dismiss the action based on the preclusive effect of *Kale I*. The district court (Tauro, U.S.D.J.) granted the motion, ruling that the failure to bring the state-law claims under diversity jurisdiction in Kale I barred the assertion of those claims in another, later proceeding. *See Kale v. Combined Ins. Co.*, 736 F.Supp. 1183 (D. Mass. 1990) (*Kale II*). This appeal followed.

II. QUESTION PRESENTED

In framing the issue on appeal, we think it useful to begin by cataloguing what is not legitimately at issue.

1. There is no dispute that the plaintiff could have established diversity jurisdiction in *Kale I*, but failed properly to plead it. *See Kale II*, 736 F. Supp. at 1184 & n.3. Indeed, the record does not indicate

---

[2](...continued)
756-61. The matter of sanctions is immaterial for present purposes.

that Kale at any time alerted Judge Skinner to the existence — or even the possibility — of diversity jurisdiction.

2. Kale has never contended that his claims, or any of them, were so lacking in value as to fall below the "amount in controversy" requirement for diversity jurisdiction, *see* 28 U.S.C. § 1332(a).

3. It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect. *See, e.g., Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (listing cases that illustrate trend towards giving claim-preclusive effect to dismissals based on statutes of limitations), *cert. denied*, 476 U.S. 1159 (1986); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (per curiam); cf. Fed. R. Civ. P. 41(b). Thus, the disposition of the ADEA claim in *Kale I* comprised a suitable springboard for the deployment of res judicata.

4. The parties agree that, given the contours of the *Kale I* record, Judge Skinner had every right to dismiss the state-law claim without prejudice once the federal cause of action was resolved on the merits. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In any event, Kale did not appeal from the dismissal order.

5. It is also uncontested that the implied contract claim in *Kale II* was pleaded and dismissed in *Kale I*. While the parties do dispute whether the other state-law claims pleaded in *Kale II* were "brought" in *Kale I*, we need not enter that debate. The judgment in *Kale I* was rendered by a federal court acting under its federal question jurisdiction. Hence, the avail-

ability of a *res judicata* defense in this case depends on the federal-law standard. *See, e.g., Cerner*, 583 F.2d at 832. Once there has been an adjudication on the merits, federal law stipulates that all claims which are "part of the same cause of action" are extinguished, whether or not actually asserted in the original action. *See Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) (en banc); *see also Lovely v. Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974); *cf. Flumara v. Fireman's Fund Ins. Cos.*, 746 F.2d 87, 91 (1st Cir. 1984) (same; New Hampshire law); *Isaac v. Schwartz*, 706 F.2d 15, 16 (1st Cir. 1983) (same; Massachusetts law). In other words, the doctrine of *res judicata*, in its federal formulation, insists that the decision in *Kale I* must preclude in a subsequent suit (1) all claims which were actually brought in *Kale I* and (2) all related claims, i.e., all claims arising out of the same cause of action.

6. Whatever the relationship between the state-law claims asserted, variously, in the two complaints, it is beyond cavil that, at the very least, the claims pleaded in *Kale II* could all have been joined in Kale's original complaint. *See* Fed. R. Civ. P. 8(e)(2) (a plaintiff may set forth multiple statements of claim in a single complaint); Fed. R. Civ. P. 18(a) (a party may join in a single action "as many claims . . . as the party has against an opposing party").

Having tapered the lens of inquiry, it can be seen that this appeal, stripped to bare essentials, presents the following question: when a state-law claim, originally brought pendent to a federal claim, is dismissed without prejudice for want of subject

matter jurisdiction following rejection of the joined federal claim on the merits, under circumstances where the plaintiff could have asserted an alternative jurisdictional basis but did not, and the plaintiff thereafter brings a new suit against the same defendant which includes the pendent state-law claim as well as other state-law claims which could have been pleaded in the initial suit; *quaere:* are the state-law claims in the second suit precluded by the original adjudication? Put another way, should the judgment in *Kale I* be accorded preclusive effect with respect to the claims asserted in *Kale II*, inasmuch as those claims could have been prosecuted in *Kale I* had the plaintiff elected to plead an available alternative basis for jurisdiction?[3]

III. ANSWERING THE QUESTION

We answer the question presented in the affirmative, holding that when a plaintiff pleads a claim in federal court, he must, to avoid the onus of claim-splitting, bring all related state claims in the same

---

[3]It makes no theoretical difference that *Kale II* was removed to a federal venue. Had Coinco not removed the case, the result in the state superior court should be identical to the result reached here. After all, *Kale I* ended in a federal judgment and Massachusetts law provides for the application of federal *res judicata* principles when the "preclusive effect of a Federal court's judgment" is at issue. *See Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164, 1167 (1982).

lawsuit so long as any suitable basis for subject matter jurisdiction exists. We reach this conclusion without special deference to the decision below. The case was decided on a motion to dismiss brought under Civil Rule 12(b)(6) and appellate courts ordinarily review such rulings *de novo*. *See Gonzalez-Bernal v. United States*, 907 F.2d 246, 248 (1st Cir. 1990); *see also Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990) ("[i]n the Rule 12(b)(6) milieu, an appellate court operates under the same constraints that bind the district court").[4]

A.

We start our analysis with some abecedarian truths. Under a federal-law standard, the essential elements of claim preclusion are (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suits; and (3) an identity of parties or privies in the two

---

[4]Even if the submission of counsel's affidavit, containing copies of relevant *Kale I* materials, effectively converted the motion into a summary judgment motion, see Fed. R. Civ. P. 12(b), the standard of appellate review would remain the same. *See, e.g., Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990) (appellate review of summary judgment is plenary); *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989) (same).

suits. *See In re Air Crash at Dallas/Fort Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984); *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). Two elements are unarguably in evidence here. First, there was a final judgment in *Kale I*, comprising an adjudication on the merits for purposes of claim preclusion. *See supra* pp. 4-5. Second, there was an absolute identity of parties in *Kale I* and *Kale II*. Any hope of avoiding preclusion must, therefore, rest with the least mechanical of the three requirements: identity of cause of action.

Concededly, the phrase "identity of cause of action" is more easily stated than defined. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 944 (7th Cir. 1981). A single cause of action can manifest itself in an outpouring of different claims, based variously on federal statutes, state statutes, and the common law. *See Athlone*, 746 F.2d at 983. Yet, such heterogeneity alone does not work an exception to the rule of preclusion. So long as different theories of recovery, howsoever prolific, derive from the same cause of action, the requisite identity is achieved if, and to the extent that, all such theories concern "the same operative nucleus of fact." *Lovely*, 498 F.2d at 1263. In other words, as long as the "new complaint grows out of the same 'transaction or series of connected transactions' as the old complaint," *Isaac*, 706 F.2d at 17 (quoting Restatement (Second) of Judgments § 24), the causes of action are considered to be identical for *res judicata* purposes. Thus, if the claims asserted in

Kale I and *Kale II*, respectively, were sufficiently related, that is, if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong, the two suits advanced the same cause of action notwithstanding any differences in remedies sought or theories of recovery pleaded. *A fortiori*, our focus must not be the theoretical raiment in which the claims are robed, but "whether the underlying facts of both transactions were the same or substantially similar." *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 6 (1st Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986).

In light of the foregoing, it necessarily follows that a particular legal theory not pressed in the original suit will nonetheless be precluded in the subsequent one if it prescinds from the same set of operative facts. *See, e.g., Cemer*, 583 F.2d at 832 ("Where two successive suits seek recovery for the same injury, a judgment on the merits operates as a bar to the later suit, even though a different legal theory of recovery is advanced in the second suit."). In this way, the law prevents a litigant from claim-splitting, requiring that he "assert all his various legal theories and factually related allegations the first time he brings suit." *Rose*, 778 F.2d at 79.

We turn from the general to the specific. It is nose-on-the-face plain that the claims in *Kale II* stemmed from the same transactional hub as the claims previously mounted in *Kale I*. Though dressed in somewhat different garb, the claims all sought recovery in consequence of the same occurrence: defendant's unilateral termination of the plaintiff's employment.

The differences were differences in the theories of liability and the selection of remedies, not differences in the fundamental cause of action. As the district court found, there was an identity of cause of action. *See Kale II*, 736 F. Supp. at 1185-86 & n.7.

It appears, then, that all the elements of classic claim preclusion are present in this situation. Unless *res judicata* is to be robbed of its doctrinal significance, appellant had an obligation to cluster his theories of recovery in *Kale I*, by whatever necessary jurisdictional means, or else forever hold his peace.

B.

Existing precedent, though scanty, supports such a preclusionary result. The only case directly in point — and it could hardly be more so — is *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988). There, the situation was virtually identical. Shaver, a discharged employee, sued for age discrimination in the district court, asserting federal question jurisdiction and joining pendent state claims. *Id.* at 1363. The district court granted summary judgment in defendant's favor, finding Shaver's ADEA claim untimely. *Id.* The court declined to exercise pendent jurisdiction over the state claims and dismissed them. Id. Shaver, who realized "that diversity jurisdiction existed," *id.* at 1364 n.1, made no effort "to allege an alternative jurisdictional basis in an attempt to pursue his state law contract claims" in the original

action. *Id.* at 1363. Instead, he brought a fresh suit in the state court alleging a variety of state-law claims. *Id.* As here, the defendant removed the case to the federal district court pursuant to 28 U.S.C. §§ 1332, 1441.

The district court in the second *Shaver* case granted summary judgment on grounds independent of *res judicata*. The Seventh Circuit, however, went directly for the jugular, holding squarely that:

> Because Shaver neglected to assert the existence of diversity jurisdiction in his prior action in order to pursue his breach of contract claims, both the strict test of and the policy behind the *res judicata* doctrine bars the present action.

Shaver, 840 F.2d at 1368; *see also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4412 at 67-68 n.0.6 (Supp. 1990) (discussing *Shaver* with approval).

Appellant does not dispute that *Shaver* is on all fours with his case. Rather, he claims it was wrongly decided. We do not agree. In our view, the reasoning of the *Shaver* majority, 840 F.2d at 1364-68, is impeccable. We adopt it enthusiastically, without exegetic discussion. There is simply no point in attempting to reinvent so well-fashioned a wheel.

Appellant also essays an end run around *Shaver*, arguing that, even if *Shaver* is good law, he could not reasonably have been expected to anticipate the holding.[5] Whatever the merits of the Seventh

---

[5]*Shaver* was decided well after Judge Skinner dismissed the state-law claim in *Kale I*.

Circuit's opinion, appellant's thesis runs, a grave injustice would result from "retroactively" foisting the *Shaver* rule upon him. The plea holds little water. While the circumstances of Kale's case are admittedly unusual, the doctrine governing its resolution is quite mature and unencumbered by contradictions or ambiguities in respect to the question at hand. Rather than emanating from some dark interstice of the law, the district court's holding in *Kale II* was entirely predictable. So, too, was the outcome in *Shaver*. There is no unfairness, under all the circumstances, in declining to extricate the plaintiff from a self-dug hole.

C.

Appellant is not short of fall-back positions. He contends that, even if the rule is as we envision it, his case is outside the rule because Judge Skinner dismissed the state-law claim in *Kale I* "without prejudice." This contention represents an unvarnished attempt to squeeze an elephant's foot into a pony's shoe. To be sure, claim preclusion can be avoided where "the court in the first action has expressly reserved the plaintiff's right to maintain the second action." Restatement (Second) of Judgments § 26(1)(b) (1982). But, the exception does not pertain here. Judge Skinner's use of the phrase "without prejudice" was supererogatory, because the dismissal of pendent claims on jurisdictional grounds is always without prejudice. *See* Fed. R. Civ. P. 41(b); *see also United Mine Workers*, 383

U.S. at 726-27; *Rose*, 778 F.2d at 79. Thus, the phrase "without prejudice" added nothing to what transpired. In any event, the phrase could not have constituted an express reservation, as Kale had withheld from the judge the very information which would have made such a reservation meaningful. *See infra* Part III(D).

D.

Appellant's next initiative hawks a further exception to claim preclusion. In general, the rule requiring all claims arising from a single cause of action to be asserted in a single lawsuit will not apply if the plaintiff was unable to assert a particular claim or theory in the original case "because of the limitations on the subject matter jurisdiction of the courts." Restatement (Second) of Judgments § 26(1)(c) (1982). This jurisdictional competence exception permits the maintenance in a second suit of a claim stemming from the cause of action previously sued upon "if a jurisdictional obstacle has precluded raising that issue in the first action." *Pasterczyk v. Fair*, 819 F.2d 12, 14 (1st Cir. 1987).

For the jurisdictional competence exception to flower, it must be shown that the claim pressed in the second suit could not have been asserted and resolved in the first suit by reason of limitations on the first court's jurisdiction. This determination must be made by the second court, giving preclusive effect to any jurisdictional determinations made by the first court (so long as the requirements of collat-

eral estoppel, i.e., issue preclusion, have been met).[6] Accordingly, when *Kale II* arose, it was up to Judge Tauro to determine whether the nonfederal claims could have been litigated in *Kale I* if the plaintiff had chosen to engage the district court's diversity jurisdiction, and if so, the legal effect of that fact.

Judge Tauro's response was patently correct on all scores. The existence of an alternate hook on which federal court jurisdiction could have been hung, permitting state-law claims to be freely litigated in a federal forum, rendered the competency exception inapplicable. After all, for it to pertain, the jurisdictional obstacle to joinder of all claims must be attributable to limitations on the first court's power to hear and decide a claim rather than to a party's contrivance.

---

[6]There was no issue preclusion applicable to the defense raised in *Kale II*. Since Judge Skinner was not made aware of the existence of diversity jurisdiction, his dismissal could only have been based on the special nature of pendent jurisdiction. Thus, the only preclusive effect the dismissal could have would be to forestall litigation of that particular issue, not the broader issue of whether jurisdiction could have been achieved in some other way. So, while *Kale I* finally determined that there was no pendent jurisdiction for the state-law claim, it did not in any way purport to determine that nonfederal claims could not otherwise have been brought within the district court's subject matter jurisdiction.

E.

There is one last arrow in appellant's quiver. He importunes that, regardless of ordinary rules of *res judicata*, the equities demand that his current suit be given free passage. This entreaty overlooks, however, that the doctrine of *res judicata* is no "mere matter of practice or procedure," but "a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). Although we have recognized the existence of judicial power to make an "occasional exception" to claim preclusion in order "to prevent unusual hardship," *Rose*, 778 F.2d at 82, this case does not fit that narrow mold. Appellant knew of the existence of diversity jurisdiction in *Kale I* and chose not to assert it.It was this choice — and this choice alone — that led to Judge Skinner's order of dismissal. In short, appellant's splitting of his claims was voluntary: he had a full and fair opportunity to litigate all his claims in *Kale I*, but declined to avail himself of it.

We see no injustice in applying time-honored principles of claim preclusion in such a situation. Whenever a litigant decides to enter the court system to seek justice, he must play by the rules. Any idiosyncratic unfairness that may result from the consistent and straightforward application of preclusion principles is, we think, far outweighed by the systemic benefits which flow from steadfast adherence

to so salutary a doctrine. *See Moitie*, 452 U.S. at 401-02. As *Rose* teaches:

> [I]f courts relaxed the principles of claim preclusion every time it appeared that a litigant had a strong claim 'on the equities,' the doctrine would fail to serve its purposes of promoting judicial economy and repose. In some individual instances a fairer result might be achieved, but more often the litigation of stale claims and the resulting uncertainty would mean injustice or hardship.

778 F.2d at 82. There is no basis for abandoning the rules in this case.

IV. CONCLUSION

We need go no further. Appellant's failure to assert diversity jurisdiction when it unarguably existed, and he knew as much, gave the judgment in *Kale I* wide-ranging preclusive effect. *Kale II*, therefore, exemplified the classic claim preclusion paradigm. Because of this, and because the case did not fall within an exception to the normal rules of *res judicata*, Judge Tauro's dismissal order was wholly appropriate.

Affirmed.

Appendix.

United States District Court
District of Massachusetts

Carl Kale,
Plaintiff,

v. CA No. 89-1640-T

Combined Insurance
Company of America,
Defendant

MEMORANDUM
May 1, 1990

[736 F. Supp. 1183]

TAURO, D.J.

Plaintiff, Kale is a Massachusetts resident and a twenty year employee of Defendant and its predecessor-in-interest. In May 1989, he brought an action in Middlesex County Superior Court alleging a host of state law claims stemming from his employment termination in March 1983. Defendant, Combined, an Illinois corporation with a principal place of business in that state, timely removed the action to this court on the basis of diversity of citizenship.

Appendix.

Now, Combined asks this court to dismiss this case on *res judicata* grounds.[1] It argues that the claims raised now by Kale could have been asserted in a 1985 federal suit filed by him, that was later dismissed by Judge Skinner in September 1986. Combined argues further that Kale's failure to raise these claims in the 1985 suit precludes them now.

This motion to dismiss raises the novel question of whether a plaintiff asserting federal question jurisdiction in federal court must, on pain of later preclusion, also assert diversity jurisdiction, where available, in order to join all related state claims.

I.

Back in May 1985, Kale filed a civil action in the United States District Court for the District of Massachusetts, alleging that his employment was terminated in violation of the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 621, *et seq. See Carl Kale v. Combined Insurance Company of America*, C.A. No. 85-1840-5 (D. Mass. dismissed Sept. 26, 1986) (Skinner, J.) [*"Kale I"*]. In addition, Kale's complaint raised state law claims of intention-

---

[1]Here, *res judicata* is used in its narrower sense to describe the doctrine of claim preclusion pursuant to which "a final judgment on the merits bars a new suit on the same claim or cause of action." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.401 n. 13 (2d ed. 1984).

al infliction of emotional distress and breach of the covenant of good faith and fair dealing.[2]

With respect to the state claims, Kale asserted discretionary pendent jurisdiction. Diversity jurisdiction was never properly plead.[3]

Kale I's ADEA claim was dismissed as timebarred. See *Kale I, aff'd*, 861 F.2d 746 (1st Cir. 1988). With the lone federal claim gone, the court, having no apparent independent jurisdictional basis for adju-

---

[2]The claim for intentional infliction of emotional distress was voluntarily dismissed on October 8, 1985.

[3]Although Kale nominally cited 28 U.S.C. § 1332 among a list of jurisdictional citations in his original federal complaint, he failed to make the requisite pleading as to jurisdictional amount. *See* 28 U.S.C. § 1332(a). The burden of proving the existence of the elements necessary for diversity jurisdiction, of course, lies with the pleader. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (finding plaintiff responsible for claiming the sufficiency of jurisdictional amount); *Topp v. CompAir, Inc.*, 814 F.2d 830, 839 (1st Cir. 1987). Kale made no formal allegation that he had met the jurisdictional amount requirement. *See Berman v. New Hampshire Jockey Club, Inc.*, 292 F. Supp. 993, 998 (D.N.H. 1968). Moreover, the only specific monetary claim in the complaint which could colorably satisfy the jurisdictional amount pleading requirement was a $1,000,000 claim for intentional infliction of emotional distress. This claim was voluntarily dismissed by Kale nearly one year before Judge Skinner allowed the motion for summary judgment in *Kale I*. No jurisdictional amount remained, therefore, once the intentional infliction claim was excised.

dicating the related state claims, declined to exercise pendent jurisdiction. *Id.* (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). With respect to these state claims, the court purported to dismiss them "without prejudice."

In this action, *Kale II*, which was removed from state court on the basis of diversity of citizenship,[4] plaintiff asserts several state law claims of wrongful termination.[5] Combined moves to dismiss because the claims raised in *Kale II* should have been included in the *Kale I* action. It contends that, had diversity jurisdiction been plead in *Kale I*, the state law claims could have been adjudicated on the merits. And so, because the pendent state claims *could* have been adjudicated in *Kale I*, pursuant to the court's mandatory diversity jurisdiction, they are now barred.

Kale's response is that the court in *Kale I* specifically dismissed the state claims "without prejudice."

---

[4]Kale has never disputed that diversity jurisdiction was available in both *Kale I* and *Kale II*.

[5]Specifically, Kale seeks a declaration that he had the right to continued employment terminable only for just cause, and that Combined was bound to its predecessor-in-interest's promise that Kale's employment was extended and maintained on that basis. Counts I, II. Counts III, IV, and V claim breach of an implied contract, an oral contract, and an employment contract, respectively. Count VI charges Combined with having negligently breached both the implied covenant of good faith and fair dealing and specific contractual rights. Finally, count VII alleges promissory estoppel.

He argues, that these wholly state-created claims cannot now be barred by the fortuity of defendant's having removed *Kale II* to federal court.[6]

III.

Res judicata is a firmly rooted rule of "'fundamental and substantial justice,'" not "'a mere matter of practice or procedure inherited from a more technical time than ours.'" *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Indeed, once the elements for claim preclusion have been established, there is little room for the making of "'ad hoc determination(s) of the equities in a particular case.'" *See Rose v. Town of Harwich*, 778 F.2d 77, 82 (1st Cir. 1985)

---

[6]At oral argument, Combined expressly contested the suggestion that, had they allowed the suit to go forward in state court, a divergent result on *res judicata* grounds would have been permissible. Its counsel stressed that a state court would have been compelled to raise the same bar against any claims which could have, and thus should have, been raised in *Kale I*. *See Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164 (1982) (ruling that preclusive effects of a federal judgment should be determined under federal law, and that failure to assert state claims under federal court's pendent jurisdiction raised bar to second action in state court).

(quoting Moitie, 452 U.S. 394 at 401). Because public policy demands that there be an end to litigation, the doctrine has been consistently invoked to "protect adversaries from the expense and vexation attending multiple lawsuits," "conserve[] judicial resources," and "foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Walsh v. International Longshoremen's Assoc., Local 799*, 630 F.2d 864, 867-68 (1st Cir. 1980) (citations omitted). *See also Allen v. McCurry*, 442 U.S. 127 (1980).

A claim is deemed precluded when there is: "(1) identity or privity of the parties to the action; (2) identity of the causes of action; and (3) a prior judgment on the merits." *Associated General Contractors v. Boston District Council of Carpenters*, 642 F. Supp. 1435, 1438 (D. Mass. 1986).

Here, the parties are identical. No one argues otherwise, nor does this suit's caption differ from the original one.

With respect to the identity of claims, the Restatement (Second) of Judgments makes clear that claims or causes of action are identical for claim preclusion purposes when they are "part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments,§ 24(1) (1980). *See also Rose*, 778 F.2d at 79. Applying the federal definition of a claim or cause of action, *Kale I* and *Kale II* arise from the same core of operative facts — Combined's termina-

tion of Kale — and as such, constitute the same claim.[7]

Lastly, the dismissal of *Kale I* on statute of limitations grounds constituted a valid and final judgment. There is overwhelming support for giving preclusive effect to dismissals based on the statute of limitations. *See Thompson Trucking, Inc. v. Dorsey Trailers*, 880 F.2d 818 (5th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989); *PRC Harris v. Boeing Co.*, 700 F.2d 894 (2d Cir. 1983); *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979); *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978); *Chang v. Northwestern Memorial Hosp.*, 549 F. Supp. 90 (N.D.Ill. 1982); 18 C. Wright, A. Miller & E. Cooper, 18 *Federal Practice and Procedure*, § 4441 (1981) [Wright & Miller]. *Cf. Rose*, 778 F.2d at 80 ("For one thing, our survey of

---

[7]Even though some different claims are raised in the second action, for purposes of claim preclusion they are nonetheless the same:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kind of relief.

Restatement (Second) of Judgments, § 24(2) comment c.

recent cases suggests a clear trend toward giving preclusive effect to dismissals based on the statute of limitations.") Once there is such an adjudication on the merits, all related claims that could have been brought are extinguished. *See Moitie*, 452 U.S. 394 at 398; *Isaac v. Schwartz*, 706 F.2d 15, 17 (1st Cir. 1983) ("The issue is not whether the plaintiff in fact argued his . . . claims in the [first] proceeding, but whether he could have.'") (quoting *Lovely v. Laliberte*, 498 F.2d 1261, 1263 (1st Cir. 1974)); Restatement (Second) of Judgments, § 24(1); Wright & Miller, §4411 at 86 ("A second action may be precluded on the ground that the same claim or cause of action was advanced in the first action even though a different source of law is involved.")

IV.

Combined's motion to dismiss theorizes that not only all legal theories should have been brought in *Kale I*, but also that all jurisdictional bases, including diversity jurisdiction, should have been asserted as well. This court agrees. Indeed, several Supreme Court Justices have expressed this view with respect to the assertion of contingent pendent jurisdiction in an original federal question case.[8] *See Moitie*, 452

---

[8]In *Moitie*, after a federal antitrust action was dismissed for failure to assert a proper injury, a second action removed to federal court asserting state law theories was *res judicata*. The majority believed that it only needed to

(continued...)

U.S. 394 at 404 (Blackmun, J., with whom Marshall, J. joins, concurring in judgment) ("The dismissal of *Brown I* is *res judicata* not only as to all claims respondents actually raised, but also to all claims that could have been raised."). *Id.* 452 U.S. at 411 (Brennan, J., dissenting) ("[I] would hold that the dismissal of *Brown I* is *res judicata* not only as to every matter that was actually litigated, but also as to every ground or theory of recovery that might have been presented.").[9]

The only Circuit Court of Appeals answering this question with respect to diversity jurisdiction has held that a failure to assert the existence of diversity jurisdiction over state claims in a prior federal action precludes their assertion in a second action. *See Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988). The facts of *Shaver* are extraordinarily similar to those here. There, too, a federal

---

[8](...continued)
reach the question of whether the federal law claims were precluded. It left unanswered the question whether the state claims were also foreclosed. On remand, however, the Court of Appeals, agreeing with the reasoning of Justice Blackmun's concurrence, ruled that the state claims were *res judicata*.

[9]Courts of Appeals have reached the same result. *See, e.g., Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981) (failure to assert discretionary pendent jurisdiction barred second action); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same).

action under the ADEA and various pendent state claims was brought by a former employee. After finding the federal claim time-barred, the district court refused to exercise pendent jurisdiction over the state claims. A second action brought in state court was removed to federal court on the basis of diversity of citizenship. Once there, the defendant moved for summary judgment on *res judicata* grounds and on the merits. Passing over the *res judicata* issue, the district court entered a summary judgment in defendant's favor on the merits.

The Court of Appeals for the Seventh Circuit, believing that the lower court should have avoided deciding the state law issues if it could have ruled solely on *res judicata* grounds, likewise dismissed the second suit, but for reasons of claim preclusion.[10]

V.

Even when, as here, the preconditions for preclusion are met, some courts have recognized the necessity of an "occasional exception to prevent undue hardship." *See Rose*, 778 F.2d at 82. *See also Moitie*, 452 U.S. 394 at 403 (Blackmun, J., with

---

[10]Professors Wright and Miller, commenting on the *Shaver* decision, agree that "a plaintiff who could invoke both federal and diversity jurisdiction should not be allowed to bypass the opportunity to secure a single adjudication of all claims." Wright & Miller, § 4412 at 67-68 n. 0.6 (Supp. 1990).

whom Marshall, J. joins, concurring in judgment). *Rose* would require a plaintiff to show clearly and convincingly that the policies favoring preclusion in the second action are outweighed by an extraordinary reason. *Rose*, 778 F.2d at 82 (citing Restatement (Second) of Judgment, § 26(1)(f)). This is not such a case. There were no jurisdictional obstacles to Kale bringing his state claims under the district court's mandatory diversity jurisdiction.[11]

Similarly, Kale cannot complain that he was "'caught in a mesh of procedural complexities.'" *Moitie*, 452 U.S. 394 at 403 (quoting *Reed v. Allen*, 286 U.S. 191 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting)). The application of *res judicata* to this case is not unduly formalistic, but rather flows as a natural consequence of the application of claim preclusion.[12]

Kale also appears to argue that the policy behind *res judicata* is not served in this case. Specifically,

---

[11]Kale's failure to join all theories and jurisdictional bases might have been forgivable if he had a good reason for not being aware of the opportunity to assert diversity jurisdiction. *See* Wright & Miller, § 4412 at 68 n. 0.6 (Supp. 1990). He knew that the parties had diverse citizenship, and indeed made a failed attempt at claiming such jurisdiction.

[12]Indeed, as Wright and Miller explain, where a federal court has full, independent jurisdiction over all legal theories (i.e., federal question and diversity jurisdiction), "several decisions have ruled that . . . there is a single claim, all parts of which must be presented to the first court chosen." Wright & Miller, § 4412 at 95.

Kale contends that if there had not been complete diversity, his second action would not have been barred. That argument, however, misses the point. The policies of efficiency, fairness, and repose are served by application of the *res judicata* bar. *See Shaver*, 840 F.2d at 1367 n.2 ("Multiple lawsuits in separate forums, as well as requiring more than one court to analyze and digest the facts of a case, all have the effect of harassing defendants and wasting judicial manpower — the precise dangers the doctrine intends to prevent."). The doctrine of claim preclusion requires that, barring a jurisdictional obstacle, a plaintiff allege all legal theories for relief flowing from a transaction or series of transactions in his first *voluntarily chosen* forum.[13]

Relying on the dissenting opinion in *Shaver*, Kale also contends that the prohibition against claim-splitting should not apply when the claims are involuntarily split. The case cited on this point by the Shaver dissent, *Nilsen v. City of Moss Point, Miss.*,

---

[13]At least one case goes far further than the rule articulated today. *See Falk v. State Bar of Michigan*, 631 F. Supp. 1515, 1521 (W.D. Mich. 1986) ("Plaintiff should not be allowed to hale defendant into a second court simply because the first court in which he chose to sue defendant could not consider all the various theories arising from his single cause of action."). *But see Wright & Miller*, § 4412 at 66 (Supp. 1990) ("It is clear enough that a litigant should not be penalized for failing to seek a unified disposition of matters that could not have been combined in a single proceeding."); Restatement (Second) of Judgments, § 26, comment c.

701 F.2d 556, 563 (5th Cir. 1983), stated a general rule that pendent claims that a federal court refused to entertain should not later be barred. That rule makes sense because, in such a case, a party would have been unable, "through no fault of his own," to have the claims adjudicated in the first forum. *Id.* at 563. In *Nilsen*, however, it was "not the procedural system of the forum that precluded the joinder of all asserted remedies in one proceeding . . . ." *Id.* The court pointed out that "the system itself was . . . ready and able to accommodate [plaintiff's] claims . . . ." *Id.* Instead, it was the plaintiff who split her claim. Similarly, here, the claim-splitting was voluntary. Kale chose the federal forum and then elected to forego his right to invoke mandatory diversity jurisdiction.

Finally, Kale argues that his second action must not be precluded because his pendent state claim was explicitly dismissed "without prejudice" in *Kale I*. His attempt to distinguish *Shaver* on this basis is unpersuasive. With the exception of not incanting the magic words "without prejudice," in both cases, pendent state claims were dismissed for lack of jurisdiction. Dismissals for lack of jurisdiction are not "on the merits." *See* Fed. R. Civ. P. 41(b). *See also Hughes v. United States*, 4 Wall. (71 U.S.) 232, 237 (1866). *Cf. Rose*, 778 F.2d at 79.

Appendix.

V.

For the reasons stated above, defendant's Motion To Dismiss Or, In The Alternative, Motion For Entry Of Summary Judgment is hereby ALLOWED.

An order will issue.

Appendix.

United States District Court
District of Massachusetts

Carl Kale,
Plaintiff,

v. CA No. 89-1640-T

Combined Insurance
Company of America,
Defendant

ORDER
May 1, 1990

TAURO, D.J.

For the reasons stated in the accompanying Memorandum, defendant's Motion To Dismiss Or, In The Alternative, Motion For Entry Of Summary Judgment is hereby ALLOWED.

It is so ordered.

J. L. Tauro
United States District Judge

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE Plaintiff	*	CIVIL ACTION NO. 85-1840-S
v.	*	
COMBINED INSURANCE COMPANY OF AMERICA, Defendant	*	

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

September 26, 1986

SKINNER, D.J.

Plaintiff brought an action alleging in Count I of the complaint that his employment by the defendant had been terminated in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* He also brought pendent common law claims. Count II of his complaint alleging intentional infliction of emotional distress has already been voluntarily dismissed by order dated October 8, 1985. Count III alleged a breach of a covenant of good faith and fair dealing. Defendant now moves for summary judgment on Counts I and III.

Defendant claims that uncontroverted material facts demonstrate both that plaintiff's ADEA claim is time-barred and that it fails on the merits. Because I agree that plaintiff's claim is time-barred, I do not reach the merits.

Plaintiff was notified on May 11, 1983 that he was being terminated as of that day. He filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") on May 3, 1984, 357 days later.

The ADEA states that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed — . . . (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, . . .

29 U.S.C. 626(d).

Therefore, the express language of the ADEA seems to bar his claim.

It is true that the requirements of § 626 are not jurisdictional requirements. Rather, they are more in the nature of statutes of limitations and may be equitably modified. *Naton v. Bank of California*, 649 F.2d 691, 695-96 (9th Cir. 1981). Equitable tolling of the limitations period may be appropriate if the plaintiff was "excusabl[y] ignorant" of the filing requirement. *Id.*, at 696.

Appendix.

Plaintiff here was not excusably ignorant of the filing period. Section 627 of the ADEA requires that all employers post notices prepared by the Equal Employment Opportunities Commission "to effectuate the purposes of this chapter." 42 U.S.C. § 627. Defendant has submitted an uncontradicted affidavit stating that it had posted all the required notices. Several courts have found that such notices give potential plaintiffs constructive notice of their rights under the ADEA and what they must do to preserve those rights. "If notice is properly posted and the employee does not see it or sees it but is still not aware of his rights, there will normally be no tolling of the filing period." *McClinton v. Alabama By-Products Corporation*, 743 F.2d 1483, 1486 (11th Cir. 1985). *See also, Byers v. Follmer Trucking Company*, 763 F.2d 599 (3d Cir. 1985); *Vaught v. R.R. Donnelley & Sons Company*, 745 F.2d 407 (7th Cir. 1984). Nor has plaintiff suggested any other reason for his delay in filing his charge of discrimination with MCAD, such as any conduct by defendant which might have misled him into thinking that he had no claim. *See, e.g., Dillman v. Combustion Engineering*, 39 FEP Cases 1750 (2d Cir. 1986).

A plaintiff who fails to comply with the filing requirements must, at the very least, put forward an adequate explanation for his failure to comply. This plaintiff has failed to do so, and his claim is therefore time-barred.

Since I have disposed of plaintiff's lone federal claim, I now dismiss without prejudice Count III of his claim which alleges a state cause of action over

which there was only pendent jurisdiction. The exercise of pendent jurisdiction is discretionary. "[C]ertainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Walter Jay Skinner
United States District Judge

Appendix.

United States Court of Appeals
For the First Circuit

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee

[924 F.2d 1169]

Before
BREYER, *Chief Judge*,
COFFIN, *Senior Circuit Judge*,
and SELYA, *Circuit Judge*.

ORDER OF COURT

Entered: February 26, 1991

The petition for rehearing en banc filed by plaintiff-appellant Carl Kale is, under this court's internal operating procedures, considered both by the panel and by the full court. Panel rehearing is hereby *denied* for the following reasons.

Appellant's argument that his second action should survive because his pendent state-law claim in the first action was dismissed "without preju-

dice" was adequately answered in the panel opinion at pp. 12-13. Appellant's claim that the *res judicata* effect of that language was broader than the panel indicated overlooks that appellee, having won, could not appeal the "without prejudice" dismissal and thus could not be bound by that characterization to the extent urged by appellant. *See In re Public-Serv. Co.*, 898 F.2d 1, 2 (1st Cir. 1990) ("a party cannot appeal a judgment entered in its own favor"); *Bath Iron Works Corp. v. Coulombe*, 888 F. 2d 179, 180 (1st Cir. 1999) (similar); see also *Sierra Club v. Marsh*, 907 P.2d 2100 213 (1st Cir. 1990) ("appellant, having prevailed, could not have appealed [the order]").

Insofar as appellant urges, for the first time, new theories, variously characterized in his petition as "waiver," "acquiescence" and "estoppel by judgment," based on the fact that the defendant knew all along that the plaintiff could have asserted diversity jurisdiction, the contentions are not properly before us. The appellant did not make the contentions below. He did not make them in his appellate briefs. He did not make them at oral argument. He did not request leave, after oral argument, to file a supplemental brief. The points are, therefore, foreclosed. "[A] party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir. 1990) (opinion denying rehearing).

The petition for panel rehearing is *denied.*

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1697

CARL KALE,
Plaintiff, Appellant,

v.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant, Appellee.

BEFORE
Breyer, *Chief Judge*,
Campbell, Torruella, Selya, and *Cyr, Circuit Judges.*

ORDER OF COURT
Entered: February 26, 1991

The panel of judges that rendered decision in this case having denied the petition for rehearing and no judge who was a member of the panel nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc.

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:
Francis P. Scigliano
Clerk.

[cc: Messrs. Olenick and Bello]

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE,	)	
Plaintiff	)	
v.	)	Civil Action
COMBINED INSURANCE	)	No.85-1840-S
COMPANY OF AMERICA,	)	
Defendant	)	

MOTION FOR RECONSIDERATION, VACATION OF DISMISSAL, OR REMAND TO STATE COURT

Now comes the plaintiff and moves that this honorable Court reconsider its May 1, 1990 grant of the defendant's Motion to Dismiss Or, In The Alternative, Motion for Summary Judgment.

As grounds for this motion, the plaintiff submits the following:

Table of Contents

I. To treat a dismissal which was expressly "without prejudice" as being with prejudice violates both the letter and the purpose of the rules of *res judicata* 2
A. The rules of *res judicata* clearly exclude from their scope claims that were expressly dismissed "without prejudice" in the prior action 2
B. If this Court is to follow *Shaver* in expanding the rules of *res judicata*, it would be an abuse of discretion to do so retroactively, precluding claims that had been expressly preserved 4

Denied, J Tauro, DJ 7/16/90 **DOCKETED**

Appendix.

I. To treat a dismissal which was expressly "without prejudice" as being with prejudice violates both the letter and the purpose of the rules of *res judicata*.

Justice Skinner's prior dismissal of the plaintiff's state law claims was expressly without prejudice. To rule — as this Court just has — that the plaintiff's state law claims should nonetheless be treated as being completely barred on the basis of *res judicata*, turns that doctrine on its head, violating both its letter and its purpose.

A. The rules of *res judicata* clearly exclude from their scope claims that were expressly dismissed "without prejudice" in the prior action.

The plaintiff has no quarrel with authorities that say that all related claims must be asserted in one's first lawsuit or lost. However, to treat a claim as not asserted — when it *was* asserted but dismissed without prejudice — because only one of two bases for federal court jurisdiction was pled, is to treat the jurisdictional basis as part of the substantive claim.

It is "black letter law" that substance and procedure are separate. Were this not so, diversity actions would have to be tried in federal court under the rules of procedure of the state whose law created the claim.

Justice Skinner consciously chose to use the words "without prejudice" knowing that they are (as this court has derisively chosen to call them) "magic words" — as are all words of art that have been established as standard dispositions. They have a specific effect which may not be disregarded.

This Court relied, in its Memorandum, on the *Restatement of Judgments (Second)*, specifically § 24, for the general rule of claim preclusion. Again, the plaintiff has no disagreement with this general rule, but points out that § 26 of the *Restatement (Second)* recognizes clear exceptions to such claim preclusion. Indeed, this Court's Memorandum noted (at p. 9) the existence of § 26(f), dealing with discretionary exceptions to preclusion. It is hard to see how this court could have read § 26(f) without having noticed § 26(b)'s exception for when:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

Dismissal "without prejudice" is, of course, the classic way to reserve a plaintiff's right to maintain an action again.

No binding authority has been cited for ignoring this clear expression of the common understanding of the effect of dismissing a case without prejudice.

The Memorandum's citation of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981) is totally inapplicable, as (1) that case dealt with claims that had been entirely omitted from Brown's first action and (2) the initial Brown and Moitie actions had been dismissed "in their entirety" (452 U.S. at 396, 69 L.Ed.2d at 107).[1]

---

[1]Although decided under the name of *Moitie*, it was the facts of *Brown* that were the basis for the decision, as

(continued...)

Thus, under the letter of the traditional rules of *res judicata*, the plaintiff's state law claims are not precluded.

B. If this Court is to follow *Shaver* in expanding the rules of *res judicata*, it would be an abuse of discretion to do so retroactively, precluding claims that had been expressly preserved.

The plaintiff has pointed out the total lack of deference that has been shown to the Memorandum's persuasive authority, *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 109 S.Ct. 145 (#88-225, October 3, 1988), a two-to-one decision of three-member panel of the Seventh Circuit, which has been followed on this point by no other case (not even in the Seventh Circuit) — until this one.

To adopt the rule announced in *Shaver* would have the undesirable effect of forcing plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims. As a matter of judicial economy, this runs counter to the general effort to minimize the use of diversity jurisdiction.

However, if this Court chooses to do follow *Shaver*, it may not do so retroactively. It may not deprive this plaintiff of his day in court where that day in

---

[1](...continued)
Moltie was voluntarily dismissed before decision (see footnote 1 on the page of the opinion just cited).

court was expressly reserved to him by Justice Skinner.

It may not ambush the plaintiff by applying the unprecedented March 2, 1988 *Shaver* decision to a case that was filed in 1985 and dismissed in 1986. Had the plaintiff any inkling that such a case was on the horizon, diversity jurisdiction would have been asserted along with pendent jurisdiction. The Memorandum argues that nothing prevented the plaintiff from doing so. However, until now, nothing indicated that it would be necessary to do so. Indeed, the oft-expressed preference of federal courts that purely state law cases should be tried in state courts indicated that it would, in fact, be undesirable to do so, being preferable to go to state court with the case if appeal of the dismissal of the federal claim was unsuccessful.

As the general sentiment in the federal courts has been one of hostility to the use of diversity jurisdiction, it is hard to understand why a rule should be adopted here to *require* its assertion, rather than to allow a case to be taken back to the state courts after the federal claim involved is dismissed.

If any reason is needed to invoke the "occasional exception" to preclusion this Court recognizes can be allowed (*Memorandum* at page 9), this is one reason — unfair surprise. The most basic is that the root purpose behind the rules of *res judicata* is to protect the parties' right to clarity and certainty of result.

To retroactively expand the doctrine of *res judicata* to convert a dismissal without prejudice into a dismissal with prejudice is to appropriate the doct-

rine's name to oppose both its traditional rules and its root purpose.

The plaintiff went to state court with this action because it was clear that an argument could be made that he had waived diversity jurisdiction by not asserting it the first time.

If the defendant had been desirous of an adjudication on the merits on the state claims in the first action, the defendant should have asked Justice Skinner to retain the state claims under pendent jurisdiction or suggested to him the applicability of diversity jurisdiction. It could therefore even be held that the defendant has waived the use of diversity jurisdiction, barring this removal, and requiring a remand to state court. However, such a waiver-based remand would be of questionable validity. The best course is to retain jurisdiction here and allow this case to proceed to trial.

If the rules of compulsory joinder are to be extended to jurisdictional bases as well as claims, it should be done only prospectively. Such a change in the law *may not* be put into effect retroactively. As can be seen here, the effect of such retroactive application is impermissibly harsh and unpredictable, as it robs Justice Skinner's disposition of its intended effect and deprives Carl Kale of his day in court.

To change the rules retroactively, on the thinnest of precedent, while pretending that no change has been made, to foreclose a case that was expressly held open, is the grossest abuse of discretion.

Conclusion

This Court should reconsider the defendant's motion and vacate its dismissal of this case.

Appendix.

Respectfully submitted,

CARL KALE

By his attorneys,

Philip R. Olenick
Paul L. Nevins
BBO# 369330
Philip R. Olenick
BBO# 378605
40 Court Street-Suite 926
Boston, Mass. 02108
(617) 227-2889 / 720-4100

May 11, 1990

Certificate of Service

The undersigned hereby certifies that on May 11, 1990, he served a true copy of the foregoing by causing it to be deposited in the United States Mail, 1st class postage prepaid, addressed to:

Kenneth M. Bello, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

Philip R. Olenick
Philip R. Olenick

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE	)	
Plaintiff	)	
v.	)	Civil Action
COMBINED INSURANCE	)	No.85-1840-S
COMPANY OF AMERICA,	)	
Defendant	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Plaintiff Carl Kale hereby opposes the motion of defendant Combined Insurance Company of America (Combined) to dismiss the Complaint or, in the alternative, for summary judgment.

Combined makes two basic arguments:

First, that District Judge Skinner's prior explicit dismissal "without prejudice" of the plaintiff's pendent state law contract claim upon the dismissal (as late-filed) of his federal Age Discrimination in Employment Act (ADEA) claim should actually have been a *with* prejudice dismissal of all claims, due to the availability of an alternative basis for jurisdiction which had not been asserted (although Combined did not contest this ruling at the time); and

Second, that the plaintiff's Count VI, for negligent breach of implied covenant of good faith and fair dealing and of specific contractual rights, fails to state a claim and, being a tort claim, is time-barred.

These arguments will be addressed separately.

Appendix.

The With Prejudice "Without Prejudice" Dismissal

In support of its motion, Combined has submitted, as Exhibit B to the Affidavit of Kenneth M. Bello, Esquire, a copy of District Judge Skinner's **Memorandum and Order**, which granted the defendant's motion for summary judgment with respect to the plaintiff's federal ADEA claim, and expressly dismissed the state law contract claim "without prejudice" (Memorandum and Order, page 4) citing *United Mine Workers v. Gibbs*, 383 U. S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966).

U.M.W. v. Gibbs had held, of course, that:

> Certainly, if the federal claims are dismissed without trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.

383 U.S. at 726-727, 16 L.Ed.2d at 228, 86 S.Ct. at 1139. Although it cites numerous cases for the general rules of *res judicata*, Combined relies primarily on two cases, *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978) and *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert den* 109 S.Ct. 145 (#88-225, October 3, 1988).

Cemer involved a plaintiff who initially brought only a federal claim, and, after that claim had been dismissed, later filed a state court action on a state claim. After removal to federal court on the basis of diversity of citizenship, the state law claim was dismissed as *res judicata*, on the basis of traditional

rules of compulsory joinder of claims, as it had been omitted from the first action. The Sixth Circuit brushed aside the plaintiff's argument that the original dismissal should have been on the basis of lack of jurisdiction rather than on statute of limitations grounds (a distinction which would have denied *res judicata* effect to the original dismissal) by saying that the plaintiff had waived any such objection by not raising it in a direct appeal from the dismissal.

Combined relies on *Cemer* for its observation that since diversity jurisdiction had existed to support joinder of the state law claim, there was no excuse for having omitted the claim, as might have existed if the only basis for joining it had been the discretionary exercise of pendent jurisdiction.

But *Cemer* dealt with an omitted claim in a closed case, and as such it has no application where the claim objected to was not omitted at all, and the case was dismissed "without prejudice."

Combined's trump case is *Shaver*, in which two judges from the Seventh Circuit held that failure to have asserted diversity jurisdiction in the first action rendered the dismissal of pendent claims upon summary judgment on the federal claim *res judicata*. A bitter dissent, after noting that the others had reached out to decide this issue although the District Court had granted summary judgment on the merits to the defendant without reaching this issue, pointed out that there was no authority for requiring the mandatory invocation of diversity jurisdiction rather than trying the remaining state claim in state court, citing *U.M.W. v. Gibbs*.

While the majority in *Shaver* tried to depict their holding as being based on "fundamental and substantial justice" (840 F.2d at 1368), the arbitrary impact of their rule cannot be ignored: had diversity in the original action been precluded by the joinder of a managerial employee as a co-defendant, the rule the *Shaver* majority perceived would not have protected the employer. What aspect of "fundamental and substantial justice" is implicated by allowing a defendant to benefit by the fortuity of whether or not another defendant had also been joined in an action that has long ago been dismissed?

Plaintiff's counsel has not been able to locate any other case that has followed *Shaver* in invoking, in effect, "compulsory joinder of alternative jurisdictional bases."[2] Counsel's Lexis search, which found cases as recent as Friday, August 18, found merely a small number of cases which have cited *Shaver* for the unexceptionable holding that *claims* arising out of a common nucleus of operative facts, including

---

[2]It was the defendant, not the plaintiff, that asserted diversity jurisdiction and brought this case here, after the plaintiff filed in Middlesex Superior Court. Despite Combined's argument on pages 2 and 4 of its Memorandum that the plaintiff should have sought to amend his complaint after the dismissal to assert diversity jurisdiction, there can be no doubt that such an amendment would have been opposed by Combined on the basis that the plaintiff's effort to claim diversity jurisdiction had been waived by not having been asserted initially.

terminations of employment, must be joined or lost, for which it is hardly a ground-breaking authority.

Whether or not the First Circuit would adopt the *Shaver* panel's innovative expansion of *res judicata* (which plaintiff's attorneys doubt), it is not open to Combined to argue it here, given its waiver of this issue at the time of the dismissal:

The plaintiff appealed from District Judge Skinner's grant of summary judgment on the federal claim in the *Memorandum and Order* submitted to this Court as an exhibit to Mr. Bello's affidavit.

Combined appealed District Judge Skinner's separate denial of sanctions to it against the plaintiff and its counsel.

Neither appeal succeeded, though the plaintiff's appeal did elicit the first opinion in this Circuit expressly holding that equitable tolling is available in ADEA cases.

Combined never challenged — nor did it cross-appeal from — District Judge Skinner's explicit ruling, in the order the plaintiff appealed from, that the dismissal was to be "without prejudice."

Just as the plaintiff in *Cemer* was held to have waived any disagreement he may have had about the basis or effect of the dismissal of his claim by failing to take a direct appeal of the basis for that dismissal, Combined's failure to appeal that ruling must be treated as a waiver of any disagreement it may have had with District Judge Skinner's dismissal of the state claim as being "without prejudice."

This sort of waiver is quite common. The First Circuit used it in *Raxton Corporation v. Anania Associates, Inc.*, 668 F.2d 622, at 624 (1st Cir.

1982), as did the Second Circuit in *Fogel v. Chestnutt*, 668 F.2d 100, 108-09 (2nd Cir. 1981), *cert den* 459 U.S. 828 (1982), *reh den* 459 U.S. 1059 (1982). The D.C. Circuit expressly followed both of those cases in holding, in *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90, 1102-03 (D.C. Cir. 1984), *cert den* 469 U.S. 1181 (1985), that the District Court had properly refused to reopen issues omitted from a prior appeal.

As Combined did not appeal District Judge Skinner's dismissal of the state claim as being "without prejudice," it has waived any argument that the claim should not have survived.

As that state claim survived, that should allow the assertion with it of other state claims that a trial court would have the discretion to allow amendment into an action based on the original surviving claim. This leaves out only intentional infliction of emotional distress (which had been voluntarily dismissed) and claims which would be time-barred and as to which no relation-back or tolling would be applicable. (See below for to the application of these principles to the tort claim.)

In fact, under principles of notice pleading, the bulk of the plaintiff's Counts in this action are inherent in the broad wording of the original surviving claim, which was supportable under various theories that are here merely spelled out separately for clarity. (The defendant appears to understand the extent to which they are implicit in the original claim, though it calls them new theories.) Although Counts I and II, by seeking declaratory relief, seek only a subset of the relief sought by the original

surviving claim, they are ultimately based on the same legal theories.

The Claim of Negligent Breach of Implied Covenant of Good Faith and Fair Dealing

Combined argues, at the bottom of page 2 of its Memorandum, that "Massachusetts does not recognize a 'negligent' implied covenant of good faith and fair dealing." Of course, the plaintiff is not alleging the existence of a negligent *covenant* (whatever that is) but a negligent *breach*, so Combined's argument that Count VI should be dismissed for failure to state a claim appears to be based on a misreading of the Complaint.

Combined also states that Count VI, for negligent breach of implied covenant of good faith and fair dealing and of specific contractual rights, being a tort claim, is time-barred.

The original federal district court action was commenced in May of 1985, almost precisely two years after the plaintiff's discharge in May of 1983. This would have been within the three year limitations period for a tort.

Under Federal Rule 15(c), the plaintiff could have moved to amend his complaint to add this claim, with the amendment relating back to the date of the complaint. As this was so, the time clock on such a claim was effectively tolled by the filing of the complaint, as both the Massachusetts and Federal Rules 3 provide for commencement of an action simply by filing.

Had the plaintiff succeeded in his appeal of summary judgment, he could have amended his complaint to bring back in his state law claims, including

adding the tort claim, thus the clock had not yet resumed running, as any such amendment would still have related back.

The clock did not begin to run again on the tort claim until the First Circuit denied the plaintiff's appeal, in November of 1988, at which point it began to run with two years already elapsed. The plaintiff brought this new action in May of 1989, approximately six months after the First Circuit's denial of his appeal, with only about two and a half years run on the three year tort claim limitations period. (Similarly, as to the contract claims, only the same approximately two and a half years had run, so that, far from being re-filed on the last possible day, as implied by Combined in its Memorandum, the plaintiff actually still had more than half of the six year contract claim limitations period remaining.)

The Request for Summary Judgment

Combined's request for summary judgment if dismissal is not granted is not supported by any factual showing. The plaintiff's Complaint is at least verified under the pains and penalties of perjury, giving it the effect of an affidavit. If either party is entitled to summary judgment on this record, it is the plaintiff.

Appendix.

Respectfully submitted,

CARL KALE

By his attorneys,

Philip R. Olenick
Paul L. Nevins
BBO# 369330
Philip R. Olenick
BBO# 378605
40 Court Street-Suite 926
Boston, Mass. 02108
(617) 227-2889 / 720-4100

Certificate of Service

The undersigned hereby certifies that on August 25, 1989, he served a true copy of the foregoing by causing it to be deposited in the United States Mail, 1st class postage prepaid, addressed to:

Kenneth M. Bello, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

Philip R. Olenick
Philip R. Olenick

(3)

Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

No. 90-1848

In the
Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,
PETITIONER,

v.

COMBINED INSURANCE COMPANY
OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent's Brief in Opposition

KENNETH M. BELLO*
NANCY L. WALSH
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

*Counsel of Record
July 29, 1991

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Questions Presented.

I. Is the decision of the First Circuit Court of Appeals to bar Petitioner's claim asserted in an earlier proceeding pursuant to pendent jurisdiction when diversity jurisdiction was known and available, yet not asserted, consistent with well-established principles of *res judicata*?

II. Is the issue raised in the present action one of sufficient significance for the Court to grant a writ of *certiorari*?

Table of Contents.

Statement of the Case 1

Reasons for Denying the Writ 4

Introduction 4

I. The Decision Of The First Circuit Court Of Appeals Is Wholly Consistent With Well-Established Principles Of Law 5

A. The First Circuit Decision Is Consistent With Well-Established Principles Of *Res Judicata* 6

1. Judge Skinner's "Without Prejudice" Dismissal Of Petitioner's Pendent State Law Claim Was Not An Express Reservation Of That Claim 6

2. The First Circuit Correctly Applied The Principles Of *Res Judicata* To Bar Petitioner's Claims 9

B. The First Circuit Correctly Concluded That Combined Was Under No Obligation To Appeal Judge Skinner's "Without Prejudice" Dismissal 14

II. The Issue Presented In This Action Is Of Limited Significance: There Is No Conflict Among The Circuits; And Any Adverse Consequence To Petitioner Results Solely From His Own Pleading Choices 15

Conclusion 15

Appendix follows page 17

Table of Authorities Cited.

CASES.

Bath Iron Works v. *Coulombe*, 888 F.2d 179 (1st Cir. 1989) 14

TABLE OF AUTHORITIES CITED.

Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. *Risty*, 276 U.S. 567 (1928) 6n

Cemer v. *Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978) 12n

Deposit Guaranty National Bank v. *Roper*, 445 U.S. 326 (1980) 14n

Harper Plastics v. *Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981) 8n, 12

In re Public Service Co. of New Hampshire, 898 F.2d 1 (1st Cir. 1990) 14

Isaac v. *Schwartz*, 706 F.2d 15 (1st Cir. 1983) 11n

Kale v. *Combined Ins. Co. of America*, 924 F.2d 1161 (1st Cir. 1991) *passim*

Kale v. *Combined Ins. Co. of America*, 736 F. Supp. 1183 (D. Mass. 1990) *passim*

Kale v. *Combined Ins. Co. of America*, 861 F.2d 746 (1st Cir. 1988) *passim*

Kimmel v. *Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987) 8n

Lovely v. *Laliberte*, 498 F.2d 1261 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974) 11n

Poe v. *John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982) 8n

Rose v. *Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) 7n

Sager v. *Hunter Corp.*, 665 F. Supp. 575 (N.D. Ill. 1986) 8, 9

Shaver v. *F. W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988) 11, 12, 13, 15, 16

TABLE OF AUTHORITIES CITED.

Sierra Club v. *Marsh*, 907 F.2d 210 (1st Cir. 1990) 14

United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 7n

Woods Exploration & Producing Co. v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 8n

STATUTORY PROVISIONS.

Federal Rules of Civil Procedure
Rule 41(b) 7n

28 U.S.C. § 1331 2

28 U.S.C. § 1332 2

29 U.S.C. §§ 621 *et seq.* 2

Supreme Court Rule 10 15n

Supreme Court Rule 29.1 2n

OTHER AUTHORITIES.

Restatement (Second) of Judgments (1982) 13

Wright, Miller & Cooper, Federal Practice and Procedure (1982 and Supp. 1990) 11, 12, 15

No. 90-1848

In the
Supreme Court of the United States

OCTOBER TERM, 1991

CARL KALE,
PETITIONER,

v.

COMBINED INSURANCE COMPANY
OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent's Brief in Opposition

Statement of the Case.

This case arises from petitioner Carl Kale's (hereinafter "Petitioner" or "Kale") thus-far unsuccessful attempts at claim-splitting. The dismissal of the Complaint that gives rise to Petitioner's writ of *certiorari* represents the second lawsuit

filed by him against respondent Combined Insurance Company of America (hereinafter "Respondent" or "Combined") based on the termination of his employment from Combined.[1]

In his first suit, filed in 1985 in the United States District Court for the District of Massachusetts (hereinafter "*Kale I*"), Petitioner asserted federal question jurisdiction based on an alleged violation of the federal age discrimination statute, 29 U.S.C. §§ 621 *et seq*. Petitioner also asserted two state-law claims, based only on pendent jurisdiction under 28 U.S.C. § 1331, even though on the face of the Complaint diversity jurisdiction under 28 U.S.C. § 1332 was known and available.[2] *See Resp. App.* at A-1.

After extended discovery in *Kale I*, Combined moved to dismiss the federal age claim based in part on Kale's failure to file a timely charge of discrimination with the Equal Employment Opportunity Commission. The District Court (Skinner, J.) granted Combined's motion, and further dismissed "without prejudice" his state law claim "over which there was only pendent jurisdiction."[3] *Pet. App.* at A-35, A-36. Although Petitioner plainly was aware of the availability of diversity as a jurisdictional basis for his state law claim,[4] he made no effort

---

[1] Pursuant to Supreme Court Rule 29.1, Combined provides the following information. Its parent is Aon Corporation; Combined also has the following non-wholly-owned subsidiaries: Orient Aon Life Insurance Company, Ltd. (Japan), Oak Brook Holding, Inc. (Delaware), Production Life Insurance Company (Arizona), Oak Brook Life Insurance Company (Arizona) and Oxford Managers, Inc. (Illinois).

[2] Combined has attached as an Appendix to this brief (referred to herein as "*Resp. App.* at ."), copies of the Complaints filed in *Kale I* and *Kale II*, which were included in the Record before the First Circuit.

[3] Petitioner has included various documents in an Appendix to his petition for writ of *certiorari* (referred to herein as "*Pet. App.* at "). Improperly included in the Appendix, however, are several documents that were not part of the Record Appendix before the First Circuit. *See Pet. App.* at A-37, A-39, A-40, A-47.

[4] One of Kale's state law claims (alleged intentional infliction of emotional distress) was dismissed early in the proceedings in *Kale I*. 924 F.2d at 1163; *Pet. App.* at A-2.

to assert that alternate form of jurisdiction nor did he otherwise bring it to the attention of the District Court. Likewise, he neither sought reconsideration of nor appealed the dismissal of his state law claim.[5]

On May 10, 1989, Petitioner filed his second Complaint ("*Kale II*") in Massachusetts state court, alleging seven state law causes of action (including the one state law claim asserted in *Kale I*), all based again on the termination of his employment from Combined. *See Resp. App.* at A-6. Combined removed the case to federal District Court based on diversity jurisdiction, and then filed a "Motion to Dismiss or, In The Alternative, Motion For Summary Judgment." *Pet. App.* at A-21. Combined specifically argued that *res judicata* mandated dismissal of the state law claim originally asserted in *Kale I* since Petitioner could have asserted that claim in *Kale I* had he pleaded a known and available form of jurisdiction, diversity. Combined further argued that *res judicata* barred all of his state law claims since each arose out of the same transaction or occurrence (Kale's termination), and each could have been asserted in *Kale I*.

On May 1, 1990, the District Court (Tauro, J.) granted Combined's motion to dismiss the *Kale II* complaint, ruling that the Petitioner's failure to plead diversity jurisdiction in *Kale I* barred the assertion of his state law claims in *Kale II*. *Kale* v. *Combined Ins. Co. of America*, 736 F. Supp. 1183 (D. Mass. 1990); *Pet. App.* at A-18. The Court agreed with Combined that "not only all legal theories should have been brought in *Kale I*, but also . . . all jurisdictional bases, including diversity jurisdiction." 736 F.Supp. 1186; *Pet. App.* at A-25.

Petitioner thereafter appealed this dismissal to the First Circuit, contending first that Judge Skinner's use of the words "without prejudice" in *Kale I* constituted an express reservation

[5] Petitioner did appeal the dismissal of his federal age discrimination claim in *Kale I* to the First Circuit, which affirmed the District Court's opinion. *See Kale* v. *Combined Ins. Co. of America*, 861 F.2d 746 (1st Cir. 1988).

of his right to maintain a second action; and second, that preclusion of his action constituted an inappropriate "retroactive" application of a new principle of law. The First Circuit (Selya, J.), squarely rejected both arguments and affirmed the District Court's decision, concluding that,

> [Petitioner's] failure to assert diversity jurisdiction when it unarguably existed, and he knew as much, gave the judgment in *Kale I* wide-ranging preclusive effect . . . Because of this, and because the case did not fall within an exception to the normal rules of *res judicata*, Judge Tauro's dismissal order was wholly appropriate.

Kale v. *Combined Ins. Co. of America*, 924 F.2d 1161, 1169 (1st Cir. 1991); *Pet. App.* at A-1, A-17.

Petitioner subsequently filed a petition for rehearing *en banc*, which was denied by the First Circuit on February 26, 1991. *See Kale* v. *Combined*, 924 F.2d at 1169; *Pet. App.* at A-37.

Reasons for Denying the Writ.

INTRODUCTION

The petition for *certiorari* must be denied for two independent reasons: first, the decision of the First Circuit is wholly consistent with well-established principles of *res judicata* and existing authority construing that doctrine; and second, the petition presents an issue of only limited significance.

I. The Decision of the First Circuit Court of Appeals Is Wholly Consistent With Well-Established Principles of Law.

In urging this Court to grant *certiorari*, Petitioner contends that the First Circuit's decision undermines the doctrine of *res judicata* in two respects: first, by failing to give binding effect to the District Court's "without prejudice" dismissal of Petitioner's pendent claim in *Kale I*; and second, by applying the doctrine of *res judicata* to require that a plaintiff plead in his first suit not only all substantive claims, but all forms of jurisdiction. *See Petition* at 7, 17. A consideration of the fundamental principles of *res judicata*, however, demonstrates that both arguments are wholly without merit.

Petitioner also asserts that Combined somehow was precluded from raising *res judicata* as a defense because it failed to appeal Judge Skinner's "without prejudice" dismissal of the state law claim in *Kale I*. This argument was firmly and correctly rejected by the First Circuit in its denial of Petitioner's request for rehearing *en banc*. 924 F.2d at 1169; *Pet. App.* at A-38.[6]

---

[6] Without citing any legal authority, Petitioner repeatedly asserts that Combined also somehow either waived or was estopped from raising *res judicata* as a defense since Combined purportedly admitted in oral argument before the First Circuit that it was aware of the existence of diversity, yet failed to call it to the attention of the Court in *Kale I*. *See Petition* at 5, 6, 7, 8, 14, 15, 16, 17. Beyond the fact that this supposed admission is nowhere to be found in the record, it is totally meaningless since it is nothing more than a desperate attempt to shift the blame for Petitioner's failure to assert diversity jurisdiction to someone other than himself. In its Order denying Petitioner's request for rehearing *en banc*, moreover, the First Circuit referred to Petitioner's "new theories, variously characterized in his petition as 'waiver,' 'acquiescence,' and 'estoppel by judgment,' " and held that such theories were foreclosed since the Petitioner "did not make the contentions below . . . did not make them in his appellate briefs . . . did not make them at oral argument . . . [and] did not request leave, after oral argument, to file a supplemental brief." 924 F.2d at 1169; *Pet. App.* at A-38.

A. *The First Circuit Decision is Consistent With Well-Established Principles of Res Judicata.*

1. Judge Skinner's "Without Prejudice" Dismissal of Petitioner's Pendent State Law Claim Was Not An Express Reservation of That Claim.

Petitioner first argues that, by precluding his state law claim in *Kale II*, the First Circuit fails to give binding effect to the "without prejudice" dismissal of his state law claim in *Kale I*, thus undermining the doctrine of *res judicata*.[7] He specifically contends that Judge Skinner's use of the words "without prejudice" in dismissing the state law claim in *Kale I* constituted an express reservation of his right to pursue the state law claim in a subsequent proceeding and prevented the dismissal from being preclusive. *Petition* at 10.[8] He contends that by barring his claim in *Kale II*, the First Circuit converted the District Court's "without prejudice" dismissal into a "with prejudice" dismissal, and denied the original language its appropriate preclusive effect.

This argument misses the point, as the heart of Combined's argument is that because Petitioner had the power and ability to preserve his state law claim in *Kale I* by asserting a known and available basis of jurisdiction, *res judicata* bars his later

---

[7] Petitioner makes a nonsensical argument, based on an absurd hypothetical, that the First Circuit's decision will seriously limit the doctrine of *res judicata* and create "precedent for undermining every decision of every court everywhere." *Petition at* 12-14.

[8] In support of this proposition, Petitioner cites *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Risty*, 276 U.S. 567 (1928), *see Petition* at 10 n.10, but fails to mention that the words "without prejudice" in that case were followed by a detailed description of the specific claims the court intended to reserve. The dismissal in *Chicago, Milwaukee* also provided the plaintiff could pursue the reserved claims in a subsequent suit as though the first " 'had not been brought or this decree entered.' " *Id.* at 590. No similarly explicit reservation of claims accompanied Judge Skinner's dismissal in *Kale I*, nor can one be inferred.

attempt to relitigate the same claim. Petitioner thus clings to the words "without prejudice" only in a vain attempt to cure his failure to assert all available bases of federal jurisdiction in his original suit.[9]

Furthermore, there is no sound basis for Petitioner's argument that the words "without prejudice" were intended to preclude Combined from raising a valid defense based upon an otherwise appropriate application of *res judicata*. Indeed, it is much more realistic to assume that Judge Skinner did not even contemplate the issues raised here in dismissing Petitioner's pendent state law claim. As the First Circuit observed, "Judge Skinner's use of the phrase 'without prejudice' was supererogatory, because the dismissal of pendent claims on jurisdictional grounds is always without prejudice." 924 F.2d at 1167; *Pet. App.* at A-13.[10]

In its rejection of Petitioner's argument, the First Circuit held that, "the phrase could not have constituted an express reservation, as Kale had withheld from the judge the very information [the existence of diversity jurisdiction] which would have made such a reservation meaningful." *Id.* It certainly would be a quantum leap to conclude that by declining to exercise pendent jurisdiction over Petitioner's sole state law claim and dismissing the same without prejudice, that Judge

[9] The First Circuit appropriately held this argument represented "an unvarnished attempt to squeeze an elephant's foot into a pony's shoe." 924 F.2d at 1167; *Pet. App.* at A-13.

[10] Petitioner incorrectly asserts that Judge Skinner's use of the words "without prejudice" was "necessary to prevent the dismissal from being preclusive." *Petition* at 12. As the First Circuit correctly observed, "the dismissal of pendent claims on jurisdictional grounds is *always* without prejudice." 924 F.2d at 1167; *Pet. App.* at A-13 (emphasis added). *See* Fed. R. Civ. P. 41(b) ("[u]nless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction . . . operates as an adjudication on the merits"); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726-27 (1966); *Rose* v. *Town of Harwich*, 778 F.2d 77, 79 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986). The words "without prejudice," therefore, "added nothing to what transpired." *Kale II*, 924 F.2d at 1167; *Pet. App.* at A-14.

Skinner intended to deprive Combined of the defense that Kale failed in his original suit to plead a known and available basis of jurisdiction.

Kale's awareness that diversity jurisdiction was available itself demonstrates that this is not a case where it is unfair to bar his claim. As the First Circuit explained,

> [Petitioner] knew of the existence of diversity jurisdiction in *Kale I* and chose not to assert it. It was this choice — and this choice alone — that led to Judge Skinner's order of dismissal. In short, [Petitioner's] splitting of his claims was voluntary: he had a full and fair opportunity to litigate all his claims in *Kale I*, but declined to avail himself of it.

924 F.2d at 1168; *Pet. App.* at A-16.[11] Indeed, a contrary result not only would be repugnant to the principles underlying *res judicata*, but would be unfair to Combined since it would be forced to defend against a claim that could have been litigated years ago.

The conclusion that Judge Skinner's "without prejudice" dismissal was not intended to bar Combined's otherwise valid *res judicata* defense is further illustrated by the holding in *Sager* v. *Hunter Corp.*, 665 F. Supp. 575 (N.D. Ill. 1986), where a plaintiff initially filed an employment discrimination suit in state court. Pursuant to an agreed order, the case was " 'dismissed for lack of prosecution, *without prejudice* to plain-

---

[11] Courts uniformly enforce the *res judicata* bar when claim-splitting is self-induced. *See, e.g., Kimmel* v. *Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987) (failure to assert federal question claim in original diversity action barred subsequent suit); *Poe* v. *John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982) (failure to amend federal question suit in timely manner to add state claims precludes separate suit); *Harper Plastics* v. *Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981) (failure to assert discretionary pendent claims barred a second action); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same).

tiff's right to file an action in federal court under Title VII . . .'" even though the record reflected that the applicable federal statute of limitations had lapsed. *Id.* at 577 (emphasis supplied). When the plaintiff in *Sager* filed a second action in federal court, he argued that the "without prejudice" dismissal equitably tolled the statute of limitations. The court rejected this argument and held that the "without prejudice" language "[did] not affect the established statutory limitations period" or "foreclose a defendant from invoking a statute of limitations defense in a later action." *Id.* at 581.

Like the defendant's statute of limitations defense in *Sager*, Combined's contention that *res judicata* bars the state law claim asserted in *Kale I* is an independent defense. In both cases, it is apparent from the facts that the lower courts in the initial actions neither contemplated such defenses nor intended to bar defendants from raising them through the courts' invocation of the words "without prejudice."

2. The First Circuit Correctly Applied The Principles Of *Res Judicata* To Bar Petitioner's Claims.

Petitioner also contends that the First Circuit impermissibly broadens the doctrine of *res judicata* by applying it to require that a plaintiff plead in his first suit not only all substantive claims, but all forms of jurisdiction. An examination of the principles underlying the doctrine of *res judicata*, however, demonstrates that application of the rule to the case at bar is wholly consistent with the doctrinal underpinnings of the rule, and that the First Circuit correctly applied it to bar the claims sought to be asserted in *Kale II*.

The applicability of the basic elements of *res judicata* to the case at bar has never been at issue here.[12] The First Circuit

[12] The well-established essential elements of claim preclusion include (1) a final judgment on the merits; (2) an identity of the cause of action; and (3) an

held it was "nose-on-the-face plain that the claims in *Kale II* stemmed from the same transactional hub as the claims previously mounted in *Kale I* . . . defendant's unilateral termination of the plaintiff's employment." 924 F.2d at 1166. Differences between the claims in *Kale I* and *Kale II*, the First Circuit explained, "were differences in the theories of liability and the selection of remedies, not differences in the fundamental cause of action." *Id.* As the elements of claim preclusion were satisfied, Petitioner "had an obligation to cluster his theories of recovery in *Kale I*, by whatever necessary jurisdictional means, or else forever hold his peace." *Id.*

While Petitioner states that he "has no quarrel with authorities that say all related claims must be asserted in one's first lawsuit or lost," *see Petition* at 17, he attempts to distinguish his own case by arguing that to preclude his claim based on his failure to assert diversity jurisdiction is "to treat the jurisdictional basis as part of the substantive claim" when it is " 'black letter law' that substance and procedure are separate." *See Petition* at 17. This argument is not only without legal basis, it contradicts the fundamental principle that *res judicata* precludes claims based on different theories of liability or different statutes when such claims arise from the same transaction or occurrence. There is no reason to treat alternate bases of jurisdiction differently.

This conclusion and the First Circuit's decision, moreover, are consistent with substantial authority applying the principles of *res judicata* in analogous circumstances, and with existing

---

identity of parties. *Kale II*, 924 F.2d at 1165; *Pet. App.* at A-8 - A-9. The First Circuit noted that two of the elements are "unarguably" met with respect to Petitioner's claims in *Kale I* and *Kale II*: there was an absolute identity of parties in both actions, and there was a final judgment constituting an adjudication on the merits in *Kale I*. *Id.* The third element, an identity of cause of action, is also present as the claims Petitioner sought to bring in *Kale II* undoubtedly arose out of the same transaction or occurrence as those alleged in the original Complaint. 924 F.2d at 1166; *Pet. App.* at A-9. *See also Resp. App.* at A-2 - A-3; A-6 - A-9.

authority on the precise issue before the Court. *See Kale I*, 736 F. Supp. at 1187; *Pet. App.* at A-28. (preclusion of Petitioner's claim in *Kale I* was a "natural consequence" of the application of basic principles of claim preclusion).

It is well established, for example, that *res judicata* bars relitigation of all claims a plaintiff could have brought in his original suit.[13] This principle applies with equal force to alternate legal theories or jurisdictional bases. *See* Wright, Miller & Cooper, Federal Practice and Procedure § 4412 at 67-68 n.6 (Supp. 1990) ("a plaintiff who could invoke both federal and diversity jurisdiction should not be allowed to bypass the opportunity to secure a single adjudication of all claims").

As to the issue presented by the case at bar, in *Shaver* v. *F.W. Woolworth, Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988), the Seventh Circuit was presented with the identical factual scenario and reached the identical result. Like Kale, the plaintiff in *Shaver* filed a claim in federal court alleging that his termination violated the federal age discrimination act. He also brought several state law claims asserting only pendent jurisdiction. *Id.* at 1363.

As in the present case, the *Shaver* District Court dismissed the federal age claim on a motion for summary judgment because of the plaintiff's failure to file a timely charge of age discrimination and, like the case at bar, the court also dismissed the pendent state claims. Most importantly, like the case at bar, even though diversity had been available as an alternate basis of federal court jurisdiction, Shaver had failed to plead that form of jurisdiction. Rather, like Kale, he brought a second suit in state court alleging various state law claims. The second case was removed to federal court on the basis of diversity

---

[13] *See Isaac* v. *Schwartz*, 706 F.2d 15, 17 (1st Cir. 1983), *citing Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974) (the issue is " 'not whether the plaintiff in fact argued his [alternative] claims in the [first] proceeding, but whether he could have' ").

jurisdiction. Thereafter, the *Shaver* defendant successfully moved for summary judgment on a variety of theories, including *res judicata*.

The Seventh Circuit affirmed, holding that because the plaintiff had "neglected to assert the existence of diversity jurisdiction in his prior action in order to pursue his breach of contract claims, both the strict test of and policy behind the res judicata doctrine bar[red] the [second] action." *Id.* at 1368. The Seventh Circuit held that a plaintiff must "allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future." *Id.* at 1365.[14]

Both *Shaver* and the First Circuit's opinion here stand for the proposition that a plaintiff will be required to plead all possible jurisdictional bases in a single proceeding, a requirement that comports fully with the long-accepted underlying principles of *res judicata*. As a federal court has no discretion to reject a claim properly based on diversity jurisdiction, requiring a plaintiff to assert such jurisdiction is consistent with the goal of *res judicata* to "'force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the *first suit*.'" *Id.* at 1367, n.2 (citing 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4408 at 65 (1981) (emphasis in original)). *See also Cemer* v. *Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (court applies *res judicata* doctrine to bar later state court action seeking to claim breach of an employment contract where diversity was available in earlier federal action alleging age discrimination); *Harper* v. *Plastics* v. *Amoco Chemical Corp.*, 657 F.2d at 939 (*res*

[14] Petitioner asserts (again without authority) that even if *Shaver* is correct, it constitutes a new principle of law and should not be applied retroactively to the case at bar. *See Petition* at 21, 22. This contention plainly ignores the fact that the result here is not a modification of existing law or the adoption of a new rule of law, but an application of well established principles to a particular fact scenario.

judicata bars second lawsuit where a plaintiff had not included state law contract claims pursuant to discretionary *pendent* jurisdiction).

Petitioner's primary objection to *Shaver* appears to be that the case has not been relied upon for the point at issue.[15] Beyond the obvious fact that the number of subsequent citations is immaterial to the correctness of a holding, it is hard to imagine that the procedural posture presented by these cases is often presented to a court for resolution.

In the case at bar, moreover, the First Circuit correctly noted that while the circumstances of Kale's case were unusual, "the doctrine governing its resolution is quite mature and unencumbered by contradictions or ambiguities in respect to the question at hand. Rather than emanating from some dark interstice of the law, the district court's holding in *Kale II* was entirely predictable." 924 F.2d at 1167; *Pet. App.* at A-13. Similarly, the Restatement (Second) of Judgments § 25 comment e (1982) provides:

> When the plaintiff brings an action on the claim in a court, either state or federal, *in which there is no jurisdictional obstacle to his advancing both theories or grounds*, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action.

(Emphasis added.)

Thus, while the present issue is unlikely to present itself with any significant degree of frequency, the First Circuit's resolution of that issue was entirely consistent with the principles of *res judicata* discussed above.

---

[15] *See Petition* at 19-21 (despite repeated searches, Petitioner states he is unable to find *Shaver* cited for the "point in issue here"). Petitioner does admit *Shaver* has been cited in numerous cases for the underlying principles which led to its result and has been commented on favorably by Wright & Miller.

B. *The First Circuit Correctly Concluded That Combined Was Under No Obligation To Appeal Judge Skinner's "Without Prejudice" Dismissal.*

Petitioner's argument concerning Combined's failure to appeal the *Kale I* dismissal is two-fold: first, that Combined somehow was required as a matter of law to appeal Judge Skinner's "without prejudice" dismissal in order to preserve its right to assert *res judicata* in the event that a then unknown future lawsuit was filed; and second, that Combined's failure to do so estopped it from advancing *res judicata* as a defense in *Kale II*. As such, his contention is nothing more than a last-ditch effort to shift to Combined the consequences of his own failure to plead a known form of jurisdiction which was apparent on the face of his original Complaint. *See Resp. App.* at A-1.

Petitioner's legal argument that Combined was obligated to appeal was squarely rejected by the First Circuit in its Order denying Petitioner's request for rehearing *en banc*.[16] *See* 924 F.2d at 1169; *Pet. App.* at A-38; *See also In re Public Service Co. of New Hampshire*, 898 F.2d 1, 2 (1st Cir. 1990) ("a party cannot appeal a judgment entered in its own favor"); *Bath Iron Works Corp.* v. *Coulombe*, 888 F.2d 179, 180 (1st Cir. 1989) (similar); and *Sierra Club* v. *Marsh*, 907 F.2d 210, 213 (1st Cir. 1990) ("appellant, having prevailed, could not have appealed [the order]"). Furthermore, even if Combined somehow could have appealed the *Kale I* dismissal, the authority cited by Petitioner does not provide any support for his

[16] Petitioner cites to authorities that permitted, under extremely limited circumstances, a prevailing party to appeal. *Petition* at 15 n.15. None of the cited cases is remotely similar to the case at bar. *See e.g., Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 332-33 (1980) (prevailing party permitted to appeal denial of class action certification which directly affected its "economic interest"). It defies logic, moreover, to suggest that Combined somehow was adversely affected by Judge Skinner's decision to dismiss the pendent state law claim.

argument that a prevailing party who fails to appeal thereby forfeits or waives all defenses otherwise available in subsequent suits.

II. The Issue Presented in This Action Is of Limited Significance: There Is No Conflict Among the Circuits; And Any Adverse Consequence to Petitioner Results Solely from His Own Pleading Choices.

While this Court's decision to grant a petition for writ of *certiorari* is discretionary, "[g]eneral public importance of the issues, and the need to secure uniformity of federal law must be the basic touchstones" of a decision to grant *certiorari*. 16 Wright, Miller & Cooper, Federal Practice and Procedure § 4004 at 509 (1977).[17] A consideration of these "touchstones" confirms the need to deny *certiorari*.

First, the decision of the First Circuit in *Kale II* is not in conflict with the decision of any other Circuit Court to have addressed the general or specific issue presented here. To the contrary, it is entirely consistent with the nearly identical case presented to and decided by the Seventh Circuit in *Shaver* v. *F.W. Woolworth Co.*, 840 F.2d at 1361. Indeed, recognizing the limited significance of these issues, this Court denied Shaver's petition for writ of *certiorari*. In the instant case, the First Circuit "enthusiastically" adopted the "impeccable" reasoning of the *Shaver* opinion. 924 F.2d at 1167; *Pet. App.* at A-12.

The inappropriateness of granting *certiorari* in the present action is demonstrated further by an examination of the unusual

---

[17] *See also* Supreme Court Rule 10 ("[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor," including a decision by a United States Court of Appeals in conflict with the decision of another United States Court of Appeals on the same matter).

procedural histories of both the present action and *Shaver*. As both cases reflect, the issue presented by Petitioner will arise only where a plaintiff pleads one basis of jurisdiction (*e.g.*, pendent jurisdiction), but fails to plead a second form of jurisdiction (*e.g.*, diversity), which is known and available.

The issue is not only one which arises infrequently, but one which results entirely from Petitioner's own pleading choice. Petitioner argues that to "adopt the rule announced in *Shaver* would have the undesirable effect of *forcing* plaintiffs to plead diversity as well as pendent jurisdiction to keep their cases in federal court even after dismissal of their federal claims." *Petition* at 21. To the contrary, this result is not in any respect undesirable, since the basic policy underlying the doctrine of *res judicata* requires that a plaintiff assert all claims arising from a single transaction or occurrence in one lawsuit. The failure to do so results in the long-accepted forfeiture of all such claims. As the scope of the First Circuit decision is confined to those circumstances where a plaintiff knowingly fails to assert an alternate basis of jurisdiction in an earlier proceeding, it results in no more "unfairness" than that endured by any plaintiff precluded by *res judicata* from engaging in claim-splitting.

Conclusion.

For the foregoing reasons, this petition for *certiorari* must be denied.

Respectfully submitted,

KENNETH M. BELLO*
NANCY L. WALSH
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000
Counsel for Respondent
Combined Insurance Company
of America

*Counsel of Record
July 29, 1991

APPENDIX

Table of Contents

Complaint for Injunctive Relief and Damages — Civil Action No. 85-1840-S A-1

Complaint — Civil Action No. 89-3017 A-6

APPENDIX

UNITED DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARL KALE,
Plaintiff

CIVIL ACTION NO. 85-1840-S

v.

COMBINED INSURANCE COMPANY
OF AMERICA,
Defendant

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Introductory Statement

1. This is a civil action brought on behalf of a white male plaintiff. The plaintiff, who was fifty-one years of age at the time of his termination, seeks redress for discrimination on account of age, and for wrongful termination from his employment as well as intentional infliction of emotional distress.

Jurisdiction and Venue

2. Jurisdiction is based on the provisions of 28 U.S.C., § 1331, 28 U.S.C., § 1332, 28 U.S.C., § 1337 and 28 U.S.C., § 1343(4) as authorized by 29 U.S.C., § 621 *et seq*. Plaintiff also brings pendent state claims pursuant to the provisions of Rule 18(a) of the Federal Rules of Civil Procedure.

3. All conditions precedent to jurisdiction under 29 U.S.C., § 621 - *et seq*. have occurred or been complied with, to wit:

a charge of unlawful employment discrimination was filed with the United States Equal Employment Opportunity Commission and the Massachusetts Commission Against Discrimination; this action is initiated within two years of the alleged wrongful act.

4. The unlawful employment practices, which are the basis of this action, were committed within the Commonwealth of Massachusetts.

Parties

5. Plaintiff, Carl Kale, is a Massachusetts resident who resides at 293 Rindge Avenue, Cambridge, Massachusetts.

6. Defendant, Combined Insurance Company of America, is a Delaware corporation which, at the time of plaintiff's termination, did business in Massachusetts and in interstate commerce and did employ more than fifteen persons.

Statement of Facts

7. Plaintiff, who is fifty-three years of age, was first employed by the defendant's predecessor-in-interest, Hearthstone Corporation, on January 29, 1963.

8. Defendant remained with the defendant successor-in-interest as an employee of Combined Insurance Company of America, Hearthstone Division, at the time of the former's acquisition by the defendant.

9. During the term of his employment, plaintiff was employed as an accountant.

10. Plaintiff was terminated by the defendant's agents, allegedly for poor performance, on May 11, 1983.

11. Up until two years prior to his termination, plaintiff's performance had always been rated satisfactory.

12. Prior to his termination, plaintiff's supervisor, Bernard McCarthy, said that the defendant could obtain a younger person in plaintiff's position at one third less salary.

13. During the two years prior to his termination, plaintiff was subjected to disparate terms and conditions of employment including but not limited to the following: His performance appraisals, without justification, became poorer; his work was more closely scrutinized; and minor errors were magnified while similarly situated younger employees had nothing said to them.

14. Since plaintiff was the oldest of six accountants, he believes, and alleges, that the reason stated for his termination was pretextual and that his age was at least a factor in his termination. Indeed after his termination, plaintiff's duties were divided up among several younger employees.

First Claim For Relief

15. Plaintiff has been denied equal treatment and employment by the defendant because of his age in violation of 29 U.S.C., § 621-*et seq*.

Second Claim For Relief

16. Defendant, through its agents, intentionally and through extreme and outrageous conduct, caused severe emotional distress to plaintiff.

Third Claim For Relief

17. Plaintiff and defendant mutually agreed that the plaintiff would continue to be employed by the defendant from term to term upon satisfactory performance of his duties.

18. The methods by which defendant's agents were to have evaluated plaintiff's performance were governed by defendant company's personnel manual.

19. Plaintiff was never evaluated properly as unsatisfactory.

20. Plaintiff's dismissal on the basis of alleged poor performance was pretextual and unsubstantiated.

21. Plaintiff was always ready, willing and able to continue in the employment of the defendant and even offered to do so but the defendant, in terminating plaintiff's employment would not permit him to do so.

22. Defendant, in terminating plaintiff in order to benefit financially at his expense, breached the implied covenants of good faith and fair dealing which were contained in the employment relationship.

Right to Injunctive Relief

23. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for an injunction is, in respect to his age discrimination claim, plaintiff's only means of securing adequate relief.

Relief Requested

WHEREFORE plaintiff respectfully prays this Court advance the case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to:

(1) Issue a permanent injunction enjoining defendants, their agents, successors, employees, attorneys and those acting in concert with them from engaging in each of the unlawful practices set forth in this complaint, and from continuing other practices shown to be in violation of the law.

(2) Grant such other and further relief as may be just and proper, including reinstatement and back pay.

(3) Award plaintiff, with respect to his second claim for relief, $1,000,000.00.

(4) Award plaintiff his costs in this action and reasonable attorney's fees.

Plaintiff Carl Kale hereby demands a trial by jury on all issues herein triable by right of jury.

CARL KALE
By his attorney,

Dated: May 8, 1985

Paul L. Nevins
40 Court Street,
Suite 926
Boston, MA 02108
(617) 227-2889

VERIFICATION

I, Carl Kale, plaintiff in this action, certify under the pains and penalties of perjury that I have read this complaint and that the allegations it contains are true to the best of my knowledge and belief.

_____

Carl Kale

Commonwealth of Massachusetts

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 89-3017

CARL KALE,
Plaintiff

v.

COMBINED INSURANCE COMPANY
OF AMERICA,
Defendant

COMPLAINT
Jury Trial Demanded

Parties

1. The plaintiff, Carl Kale, is a natural person who resides in Middlesex County at 293 Rindge Avenue, Cambridge, Massachusetts.

2. The defendant, Combined Insurance Company of America ("Combined"), is a Delaware corporation which, at the time of the acts complained of, had a usual place of business in Norfolk County at Hearthstone Plaza, Brookline, Massachusetts.

Statement of Facts

3. Plaintiff Carl Kale was first employed by defendant Combined's predecessor-in-interest, Hearthstone Insurance Company of Massachusetts ("Hearthstone"), on January 29, 1963.

4. Hearthstone was a subsidiary of defendant Combined, which owned all shares of Hearthstone's stock other than shares held by Hearthstone's directors.

5. Combined chose all directors of Hearthstone, who were required to sell their stock in Hearthstone back to Combined upon leaving their directorships in Hearthstone.

6. At the time of his hiring by Hearthstone, Carl Kale was told by those who interviewed and hired him that if he worked out, he could expect to work there until he retired.

7. Carl Kale relied upon that representation in taking the job and in not seeking alternative employment.

8. During the term of his employment, Carl Kale was employed as an accountant. For most of that term, his title was that of internal auditor.

9. Hearthstone, by its oral promises to the plaintiff at the time he was hired, and the plaintiff by relying on those promises, accepting that employment, and performing satisfactorily, created a contractual right to continued employment of the plaintiff that would not be terminated except for just cause.

10. After the commencement of his employment with Hearthstone, Carl Kale was given additional assurances, both oral and written, including his Personnel Manual and other written materials, that he would not be discharged except for just cause.

11. Carl Kale was a full-time, permanent employee of Hearthstone, within the meaning of Hearthstone's Personnel Manual.

12. Hearthstone's Personnel Manual, policy statements, training sessions, and inspirational materials were prepared by Combined, and tailored as necessary for local Massachusetts law and custom.

13. Shortly after his employment with Hearthstone commenced, Carl was delegated the job of calculating Hearthstone's budgets.

14. As part of that job, Carl Kale was under standing orders to calculate across-the-board annual pay raises, with the specific percentage to use given to him each year by his supervisor.

15. This policy continued for over seventeen years, including after the merger of Hearthstone into Combined, as described below.

16. Carl Kale relied on this policy in remaining in his job and not seeking other employment.

17. Approximately fifteen years after Carl Kale's employment commenced, Hearthstone Insurance Company of Massachusetts was merged into its parent corporation, Combined, the defendant.

18. The defendant retained substantially all, and at least the majority, of Hearthstone's employees.

19. The defendant succeeded to Hearthstone's existing business and accounts.

20. The defendant, in the manner of its acquisition and carrying on of Hearthstone's business and the retention of its employees, succeeded to its contractual obligations, including its contractual obligations to its employees.

21. When Hearthstone Insurance Company of Massachusetts was merged into the defendant, Carl Kale continued as an employee of the defendant's Hearthstone Division.

22. After the merger of Hearthstone Insurance Company of Massachusetts into the defendant, Carl Kale was given additional assurances, both oral and written, by the defendant, including the Personnel Manual and other written materials given to him by the defendant, that he would not be discharged except for just cause.

23. These assurances and written materials were substantially identical to those previously given to Carl Kale by Hearthstone.

24. In reliance on all those assurances, Carl Kale remained in his job and did not seek alternative employment while he was still young enough to do so.

25. Carl was a full-time, permanent employee of Combined, within the meaning of Combined's Personnel Manual.

26. Carl Kale's performance in his job was always satisfactory or better.

27. Until March of 1981, Carl Kale's performance had always been rated satisfactory or better.

28. Carl Kale never received a properly conducted performance review that indicated unsatisfactory performance.

29. Starting in March of 1981, Carl Kale began to be subjected to harassment by his immediate supervisor in the form of frequent unfounded criticism, both privately and publicly, in the apparent hope that this would force his resignation.

30. After that point in time, Carl Kale was never again given even a cost-of-living raise, even when other employees in the company were receiving raises.

31. Efforts to force Carl Kale to resign were motivated by the defendant's desire to benefit financially by having his work done by younger, lower paid employees, and by diminishing the value of his vested pension rights.

32. On May 11, 1983, Carl Kale was told by agents of the defendant that his employment by the defendant was terminated, effective that same day.

33. At the time of his termination, Carl Kale's salary was twenty thousand dollars ($20,000) per year.

34. Carl Kale has always remained ready, willing and able to work.

35. The defendant's agents prevented Carl Kale from continuing in his employment by the defendant.

36. Although he made diligent efforts to find other employment in his profession as an accountant after his termination by the defendant, Carl Kale was unable to do so.

Count I

Declaratory Judgment: Existence of Right to Continued Employment

37. The allegations of paragraph 1 through 36 are hereby incorporated by reference as if fully set forth herein.

38. The plaintiff seeks a declaratory judgment by this court that by his reliance in accepting and continuing his employment with the defendant, based upon the oral and written assurances he received from the defendant, he became entitled to a legitimate expectation of continued employment by the defendant which was terminable only on the basis of just cause.

Count II

Declaratory Judgment: Defendant Bound by Predecessor's Contract Creating Right to Continued Employment

39. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

40. The plaintiff seeks a declaratory judgment by this court that (a) by his reliance in accepting and continuing his employment with the defendant's predecessor-in-interest, Hearthstone Insurance Company of Massachusetts, based upon the oral and written assurances he received from Hearthstone, he became entitled to a legitimate expectation of continued employment with Hearthstone which was terminable only on the basis of just cause, and that (b) the manner of the defendant's acquisition of the business of Hearthstone made it subject to the plaintiff's expectation of continued employment by the defendant terminable only on the basis of just cause.

Count III

Breach of Implied Contract: Employment Manuals and Other Writings

41. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

42. The defendant, in discharging the plaintiff without just cause, breached his contract of employment that may be found or implied from the language of the defendant's (and its predecessor-in-interest's) employment manuals and other written materials, and his reliance thereon and acceptance of that contract by performance, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count IV

Breach of Oral Contract

43. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

44. The defendant, in discharging the plaintiff without just cause, breached his contract of employment that may be found or implied from the language of the defendant's (and its predecessor-in-interest's) oral assurances to him, and his reliance thereon and acceptance of that contract by performance, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count V

Breach of Contract of Employment Terminable Only for Just Cause

45. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

46. The defendant, in discharging the plaintiff without just cause, breached his contract of employment that may be found or implied from the language of the defendant's (and its predecessor-in-interest's) oral assurances, employment manuals and other written materials, and his reliance thereon and acceptance of that contract by performance, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count VI

Negligent Breach of Implied Covenant of Good Faith and Fair Dealing and of Specific Contractual Rights

47. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

48. The defendant owed the plaintiff the duty not to terminate his employment without just cause, arising out of the oral and written assurances he had been given by the defendant and its predecessor-in-interest and his reliance thereon and acceptance of that contract by performance, and from the implied covenant of good faith and fair dealing that is a part of all contracts.

49. The defendant, through its agents, negligently violated its duty not to terminate him without just cause.

50. As a direct and proximate result of that negligent violation of the defendant's duty to the plaintiff not to terminate his employment without just cause, the plaintiff has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Count VII

Promissory Estoppel

51. The allegations of paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

52. The defendant, by its (and its predecessor-in-interest's) oral assurances, employment manuals and other written materials, and the plaintiff's his reliance thereon and acceptance of that contract by performance, is estopped from denying that the plaintiff was entitled to employment terminable only for just cause.

53. The defendant, in discharging the plaintiff without just cause, breached its promise to the plaintiff, whereby he has suffered reasonably foreseeable harm in the form of lost income and fringe benefits, the loss of business and personal reputation, and other financial losses.

Ad Damnum

WHEREFORE, plaintiff Carl Kale seeks, as damages under each of the above Counts, $120,000 in lost wages from the time of his discharge to date, plus interest, plus such other elements of harm which are stated in those counts but the value

of which cannot be fixed before trial, inlcuding but limited to employment after the date of this Complaint.

Respectfully submitted,

CARL KALE

By his attorneys,

Paul L. Nevins
Philip R. Olenick
40 Court Street — Suite 926
Boston, Massachusetts 02108
(617) 227-2889/720-4100
BBO#369330 (PLN); 378605 (PRO)

Verification of Ad Damnum

For purposes of compliance with the provisions of § 13B of chapter 231 of the General Laws, the plaintiff states, under oath, that with respect to the money damages claimed in his Complaint, he has calculated, as liquidated damages, the specific figure listed in the *Ad Damnum* (which does not include other claims the value of which cannot be fixed before trial).

The specific figure listed in the Ad Damnum was calculated by multiplying his lost annual salary of $20,000 per year, by six years, yielding a figure of $120,000.

Signed under the pains and penalties of perjury, this 27th date of April, 1989.

Carl Kale

Verification of Complaint

The plaintiff states, under oath, that he has personal knowledge of the facts stated in the preceding *Complaint,* and that to the best of his information and belief the facts stated therein are true.

Signed under the pains and penalties of perjury, this 27th day of April, 1989.

Carl Kane